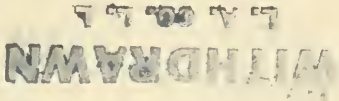
UNIVERSITY
OF CALIFORNIA
LOS ANGELES

SCHOOL OF LAW
LIBRARY

COURTS

AND THEIR JURISDICTION



A TREATISE

ON THE

JURISDICTION OF THE COURTS OF THE PRESENT DAY, HOW SUCH JURISDICTION IS CONFERRED, AND THE MEANS OF ACQUIRING AND LOSING IT

BY

JOHN D. WORKS

Formerly one of the Justices of the Supreme Court of the State of California, and author of "Indiana Pleading and Practice" and of "Removal of Causes from State to Federal Courts"

SECOND EDITION

CINCINNATI
THE ROBERT CLARKE COMPANY.
1897

T
W8928c
1897

Copyright, 1894,
By The Robert Clarke Company.

RSF 15 Feb 54

PREFACE.

The subject of jurisdiction is one of the most important connected with the administration of justice, and one upon which, in almost all of its branches, the authorities are numerous and conflicting. This being so, the most difficult task in the preparation of a work on jurisdiction is not to find authorities to support the views and conclusions of the author, but to arrive at the underlying principles controlling the numerous questions involved in the subject, to distinguish the cases, and to avoid loading the work down with too many and useless citations.

A careful study of the decided cases proves that in many of them the courts have made no effort to ascertain upon what principle a given rule of law, affecting the question, should be maintained or overthrown, but have contented themselves with laying down or discarding the rule, and citing other cases which have done the same thing in the same way. So we have the number of cases for and against a given proposition rising in columns higher and higher; the true or accepted rule depending, too often, upon the height of one column or the other, or the weight of authority *according to numbers* for or against it. Such authorities are worth nothing to the practitioner, except when he appears before a court which is controlled by this peculiar, not to say unfortunate, rule, of deciding cases by such a test of the weight of authority, when his diligence in unearthing more of the decided cases than his opponent is sure to bring him success.

The intelligent lawyer looks for something better than this, searches for the guiding principle that should sustain him, and hopes to convince the court, not by authorities alone, but by reason and authority.

An earnest effort has been made in the preparation of

this work to get below this mass of cases which rest one upon another, and find out why a given principle, or rule of law, should be maintained, and cite the cases by which the reason for the rule has been established. In many instances this has been a laborious and difficult, in others a hopeless and impossible, task. It has been an interesting and useful labor to the author, and it is with the sincere hope and trust that it will be of practical benefit to a profession the work of which becomes more and more laborious as the decided cases multiply and increase, that the work of the author is now given over to the publisher.

Upon many of the propositions laid down, the mere citation of authorities has been regarded as all that is needed; but where the authorities have not agreed, upon material questions not controlled by differing local statutory provisions, the cases have been carefully traced back and an effort made to ascertain which line of decisions is sustained by the better reason, the reasons given have been used in the notes, and the author's own conclusions have not been withheld, but have been freely given for what they are worth.

The cases and authorities have been selected with great care, and with no effort or desire to render the book imposing by their number; but it is hoped they will be found sufficiently numerous to make it practical and useful to the profession.

The work has been rendered much more difficult and laborious by reason of the fact that the jurisdiction of courts has come to be controlled and regulated, to a very great extent, by the statutes of the several states, which differ sufficiently, upon many of the questions involved, to give rise to conflicting decisions resting, not upon reason or principle, or upon the conviction of the court as to what the true rule should be, but upon statutes providing, in terms, that it shall be so in one state and different in another.

The effort has been made to avoid cumbering the book with a discussion of questions growing out of local laws, except when necessary to get at general principles, and at the same time not to avoid the labor of working out, as

fully as possible, any complications or changes growing out of and resting wholly upon them.

It will be seen that no effort has been made to treat of common law, equity, and statutory jurisdiction as separate and distinct branches of the law on the subject, but they have been treated together, upon each subject, and as affecting them all in a greater or less degree. This has been done because it is believed that they have become so intermingled by constitutional and statutory provisions that they can not be treated separately, in the same work, without useless repetition and unnecessary confusion. It will be found, however, that the rules and principles of the common law and of equity, as well as the statutory provisions relating to each subject, have been carefully considered and distinguished in treating of that subject.

A separate discussion of the specific jurisdiction of the federal courts has not been undertaken. But upon each subject considered their jurisdiction has been fully shown, and the distinguishing features of the functions and powers of the United States and state courts, and the reasons therefor, have been carefully pointed out.

The general plan of the work has been to discuss, first, general principles affecting jurisdiction, and to follow with a consideration of the means of acquiring jurisdiction, including the issuance and service of process, and then to take up each subject of jurisdiction, including the various writs at common law, in equity, and under statutory provisions, with a view to cover every material branch of the subject.

Whether the work has been so done as to render it of practical benefit is now submitted to the judgment of the courts and the profession. J. D. W.

San Diego, California, *September*, 1894.

TABLE OF CONTENTS.

CHAPTER I.

COURTS.

PAGE.

1. Defined..... 1
2. General division of..... 2
3. Common law and equity courts—in England..... 3
4. Common law and equity courts—in the United States..... 5
5. Military and maritime courts..... 6
6. Courts of record and courts not of record..... 7
7. Courts of general and superior, and of inferior and special jurisdiction..... 10

CHAPTER II.

GENERAL PRINCIPLES AFFECTING JURISDICTION.

8. Jurisdiction defined..... 16
9. Different kinds of jurisdiction..... 23
10. How jurisdiction conferred and regulated..... 28
11. How jurisdiction obtained..... 30
12. Jurisdiction of the subject-matter..... 32
13. Jurisdiction of the person..... 36
14. Jurisdiction *in rem*..... 44
15. Territorial jurisdiction..... 51
16. Jurisdiction as to amount..... 59
17. Exclusive and concurrent jurisdiction..... 68
18. Assistant jurisdiction..... 74
19. Terms of court as affecting jurisdiction..... 81
20. Special and inferior jurisdiction; how obtained and exercised.. 87
21. Original and appellate jurisdiction..... 97
22. When and how question of jurisdiction may be raised..... 103
23. How jurisdiction proved and disproved..... 122
24. How jurisdiction may be lost, taken away, or suspended..... 146
25. Presumptions in favor of jurisdiction..... 155
26. Effect of want of jurisdiction..... 168
27. Inherent powers of courts..... 170
28. Powers of illegal and *de facto* courts..... 181

PAGE.
29. Constitutional limitations of jurisdiction..... 183
30. Jurisdiction in summary proceedings..... 196
31. Control of attorneys..... 198

CHAPTER III.

MEANS OF ACQUIRING JURISDICTION.

32. Generally..... 202
33. Due process of law..... 206
34. Appearance and its effects..... 225
35. Nature and different kinds of original process..... 234
36. Requisites of process..... 239
37. Service of process..... 251
38. Constructive service of process..... 266
39. Proof of service of process..... 287
40. Defective process and service..... 297
41. Waiver of process and service and defects therein..... 300
42. Of new parties and amended pleadings..... 305
43. In actions against corporations..... 308
44. Where cross-complaint is filed..... 324

CHAPTER IV.

VENUE.

45. Commencement of action in wrong place and its effects..... 326
46. Grounds for change of venue..... 334
47. Application for change and its effects..... 338
48. Other necessary proceedings to procure transfer..... 343
49. Waiver as to venue..... 344
50. Counter motion to retain case..... 347
51. Order for change and its effects..... 348
52. Remanding cause..... 352

CHAPTER V.

JUDGES.

53. Defined..... 354
54. Power of legislature to confer or take away jurisdiction..... 355
55. Power of legislature to impose other than judicial duties on judges..... 360
56. General powers and duties of judges..... 365

PAGE.
57. Power to act in another district 366
58. Authority at chambers 372
59. Authority to act in vacation 376
60. *De jure* and *de facto* judges 379
61. Special judges 386
62. Judges disqualified by interest or otherwise 395
63. Bias and prejudice of judges as affecting jurisdiction 412
64. Liability of judge acting without jurisdiction 414

CHAPTER VI.

COMMON LAW, EQUITY, AND STATUTORY JURISDICTION.

65. Generally 420
66. Constitutional jurisdiction 426
67. Probate jurisdiction 431
68. Special cases and proceedings 461
69. Criminal jurisdiction 469
70. Maritime jurisdiction 483
71. Impeachment 487
72. Contempts 488
73. Divorce 504
74. Attachments 518
75. Garnishment 547
76. Sales of real estate 554
77. Arbitration 572
78. *Ne exeat* and arrest and bail 581
79. Injunctions 588
80. Mandamus 614
81. Prohibition 627
82. *Habeas corpus* 638
83. *Quo warranto* 659
84. New trials and vacation of judgments 670
85. Writs of error 692
86. *Certiorari* 698
87. Bills, and writs, of review 722
88. Appeals 727
89. Naturalization 737
90. Pardons 742

COURTS AND THEIR JURISDICTION.

CHAPTER I.

COURTS.

1. Defined.
2. General division of.
3. Common law and equity courts—in England.
4. Common law and equity courts—in the United States.
5. Military and maritime courts.
6. Courts of record and courts not of record.
7. Courts of general and superior, and of inferior and special jurisdiction.

1. DEFINED.—A court is defined to be "A place wherein justice is judicially administered."[1]

And as "a body in the government, organized for the public administration of justice at the time and place prescribed by law."[2]

And as "The presence of a sufficient number of the members of a body in the government, to which the public administration of justice is delegated, regularly convened in an authorized place at an appointed time, engaged in the full and regular performance of its functions."[2]

The judges of a court do not, necessarily, constitute the court. The judges, as such, have certain powers pertaining to their office which may be exercised at chambers. When so acting they are not a court. To constitute a court, the judge or judges must be in the discharge of judicial duties at the time and in the place prescribed by law for the sitting of the court.[3]

[1] 3 Blackstone's Com. 23. [2] 4 Am. and Eng. Enc. of Law, 447.

[3] *Post*, sec. 19. Hobart *v.* Hobart, 45 Iowa, 501, 503. The question in this case was whether the taking of evidence before a referee was a trial in "open court." In passing upon this question, the court said: "Blackstone, adopting Coke's definition, says: 'A court is a place where

One of the important attributes of a court, the proceedings of which must be recorded, is that of preserving such proceedings in some permanent form. This is a function that must be performed by the clerk or prothonotary of the court. Therefore the presence of such clerk or prothonotary is necessary to constitute a court of record. "A court is an incorporeal political being, which requires, for its existence, the presence of the judges, or a competent number of them, and a clerk or prothonotary, at the time during which, and at the place where it is by law authorized to be held; and the performance of some public act, indicative of a design to perform the functions of a court."[1]

"A tribunal established for the public administration of justice, and composed of one or more judges, who sit for that purpose at fixed times and places, attended by proper officers."[2]

A court of common law is defined to be "a court which administers justice according to the principles and forms of the common law," and a court of chancery as one "which proceeds wholly according to the principles of equity."[2]

2. General division of courts.—Courts may, for convenience of arrangement, and the consideration necessary to give them here, be divided into: 1. Common law and equity courts. 2. Military and maritime courts. 3. Courts of record and courts not of record. 4. Courts of superior and general jurisdiction, and courts of inferior and special jurisdiction.

justice is judicially administered.' But this definition obviously wants fullness; it is limited to the *place* of a court in its expression. In addition to the place, there must be the presence of the officers constituting the court, the judge or judges certainly, and probably the clerk authorized to record the action of the court; time must be regarded, too, for the officers of a court must be present at the place and at the time appointed bylawin order to constitute a court. To give existence to a court, then, its officers, and the time and place of holding it, must be such as are prescribed by law."

[1] Bouvier's Law Dic., title Court. [2] Anderson's Dic. of Law, 274.

3. COMMON LAW AND EQUITY COURTS, IN ENGLAND.—The distinction between law and equity courts is not as important now as it was before the enactment of the codes in many of the states, and of the judicature acts in England. The principal common law and equity courts of England, as mentioned in Blackstone's Commentaries, were the court of common pleas, the court of king's bench, the court of exchequer, the high court of chancery, the court of exchequer chamber, and the house of peers.[1]

Of these, all were common law courts, so far as their original jurisdiction was concerned, except the court of exchequer, which was both a court of law and a court of equity, and the high court of chancery, which exercised certain functions of a legal character, although its most important jurisdiction was that of a court of equity.

By what are known as the judicature acts of England, all of these courts, except the exchequer chamber and house of peers, were consolidated into one court, denominated the supreme court of judicature of England.[2]

The supreme court of judicature consists of two permanent divisions, viz., the high court of justice, and the court of appeal.[3]

The high court of justice was originally divided into five divisions, called, respectively, the chancery division, the queen's bench division, the common pleas division, the exchequer division, and the probate, divorce, and admiralty division.[4]

And while the common law, equity, admiralty, eccle-

[1] 3 Blk. Com. 36 *et seq.*

[2] "From and after the time appointed for the commencement of this act, the several courts hereinafter mentioned (that is to say), the high court of chancery of England, the court of queen's bench, the court of common pleas at Westminster, the court of exchequer, the high court of admiralty, the court of probate, the court for divorce and matrimonial causes, and the London court of bankruptcy, shall be united and consolidated together, and shall constitute, under and subject to the provisions of this act, one supreme court of judicature of England." Supreme Court of Judicature act of 1873, pt. 1, sec. 3; Foulke's Ac. in Sup. Ct. 2, 12.

[3] Sup. Ct. Jud. Act, pt. 1, sec. 4; Foulke's Ac. in Sup. Ct. 14.

[4] Ibid.

siastical, and bankruptcy courts were thus consolidated, the distinction between them, and the jurisdiction formerly exercised by each, was kept separate, in a manner, by conferring upon each of these several *divisions*, designated by the names of the former courts, the same jurisdiction that was formerly vested in the several *courts* of like name.[1] But this division was not necessarily permanent. The right to distribute the causes and matters, coming before the court, to the several divisions of the high court of justice, may be regulated and changed by the judges in council under certain restrictions.[2] In 1880, the common pleas and exchequer divisions were consolidated into the queen's bench division, thus reducing the number of divisions to three.[3] And the business that formerly belonged to the common pleas and exchequer divisions was, by this order, transferred to the queen's bench division.

The greater part of the law relating to the practice and forms of proceeding under the judicature acts will be found in the rules and orders of court. It is provided by one of these rules that the party commencing the action shall indorse on the writ of summons the division of the high court to which it is intended that the action should be assigned.[4] But this is "subject to the exclusive assignment of certain business to each division, being generally such business as the court which it represents exclusively transacted," and subject to the power of the court to transfer business from one division to another.[5]

These divisions of the court are not separate courts, nor are they so treated in practice. Each of the judges of either of the divisions represents the power and jurisdiction of the supreme court of judicature, and not the particular division of the court in which he may for the time be acting.[6]

"The judges are distributed among the divisions, namely: six to the chancery division, the lord chancellor

[1] Sup. Ct. of Jud. Act., pt. 1, sec. 34. [2] Jud. Act, 1873, sec. 32.
[3] Wilson's Jud. Acts, p. 42; Foulke's Ac. in the Sup. Ct. 18.
[4] Order 11, 1. [5] Foulke's Ac. in the Sup. Ct. 19.
[6] Jud. Act, 1873, sec. 39; Foulke's Ac. in Sup. Ct. 19.

being president; fifteen to the queen's bench division, the lord chief-justice of England being president; and two to the probate, divorce, and admiralty division, the senior judge being president. The business of each division, important enough to be brought before several judges, is in general transacted by a divisional court composed of judges belonging to that division; but there is nothing to prevent a divisional court, composed, for instance, of judges of one division, entertaining questions arising in a cause assigned to another division, except that so far as practicable one judge of the division to which the cause is assigned is to be of the divisional court which adjudicates upon it."[1]

4. COMMON LAW AND EQUITY COURTS, IN THE UNITED STATES.—We have in this country a system of federal courts and a separate and distinct system of courts in each of the states. It is not the purpose, in this connection, to attempt to designate by name, or in any other way, the various courts of common law and equity jurisdiction in the several states.[2]

In those states which have adopted the code system of practice, the courts of general original jurisdiction are much the same, although they are differently named. In some of the states they have circuit courts, in others district courts, in others superior courts, in others supreme courts; in some they have both circuit courts and superior courts, or district and superior courts, and in some the court of common pleas still exists. There are, of course, other courts having special and inferior jurisdiction, especially in probate matters. But in many of the states there is but one court of general original jurisdiction, which takes cognizance of all business, civil, criminal, and probate.

[1] Foulke's Ac. in Sup. Ct. 19. A very interesting description and history of the courts of England, by Elliott Anthony, will be found in the Am. Law Review, vol. 25, page 1.

[2] A very full description of the courts of this country, and a general statement of their jurisdiction, will be found in Stimson's Am. Statute Law, sec. 550 *et seq.*

There are very few of the states, at the present day, in which there is a division of courts into common law and equity courts, but in some the distinction between common law and equity practice is preserved, and the law and equity courts are still maintained.[1]

The distinction between common law and equity is still maintained under the federal practice, but both common law and equitable remedies are administered by the same courts, these courts having their law and equity sides. The principal federal courts of general original jurisdiction are the circuit and district courts, both of which exercise both law and equity jurisdiction.[2]

The supreme court has original jurisdiction, to a limited extent, both at law and in equity.[3] And the same is true of the court of claims.[4]

5. Military and maritime courts.—The court of *chivalry*, of England, had "cognizance of contracts touching deeds of arms or of war, out of the realm, which could not be determined or discussed by the common law, together with other usages and customs to the same matters appertaining." It was almost entirely a "court of honor," and was of but little consequence.[5]

The maritime and admiralty courts of England had jurisdiction to try and determine all maritime causes, or causes arising wholly upon the sea, and not within any county.[6] By the judicature acts this court has been merged in the high court of justice.[7]

In this country the greater part of the maritime jurisdiction belongs, of necessity, to the federal courts. We have no state maritime courts, or military courts of civil jurisdiction—except in some of the states maritime courts

[1] Harris *v.* Vanderveer's Ex., 21 N. J. Eq. 424.

[2] Rev. Stat. U. S., secs. 563, 629; Foster's Fed. Prac., p. 20, sec. 13; p. 21, sec. 15; p. 34, sec. 25.

[3] Rev. Stat. U. S., sec. 687; Foster's Fed. Prac., p. 20, sec. 14.

[4] Rev. Stat. U. S., sec. 1059; Foster's Fed. Prac., p. 20, sec. 13.

[5] 3 Black. Com. 103.

[6] 3 Black. Com. 106.

[7] Jud. Act, 1873, sec. 16.

are established in certain cities. The maritime jurisdiction of the federal courts belongs mainly, but not wholly, to the district court.[1]

6. COURTS OF RECORD AND COURTS NOT OF RECORD.—The question as to what is necessary to constitute a court of record has never been satisfactorily answered. Many tests have been laid down in an effort to distinguish between a court of record and one not of record, but none of these tests have been received and acted upon as conclusive or satisfactory.

Blackstone's definition of a court of record is: "A court of record is that where the acts and judicial proceedings are enrolled in parchment for a perpetual memorial and testimony."[2] This is the generally received idea of a court of record. The definition here given is implied in the name of the court. But this definition has been condemned by the courts in modern days as being wholly inaccurate.[3]

Another of the tests applied to courts of record was the possession of the right to fine and imprison for contempt; but it has been determined that every court of record does not possess this power. In many of the decided cases the extent of the jurisdiction of a court, or whether it be a court of superior or inferior jurisdiction, is made the test.[4]

[1] Rev. Stat. U. S., sec. 563, sub. 8.

[2] 3 Blk. Com. 24; Anderson's Dic. of Law, 275.

[3] 31 Cent. Law Jour. 86.

[4] In Hahn *v.* Kelly, 34 Cal. 391, 422 (94 Am. Dec. 742), the court said: "At common law, 'a record signifies a *roll of parchment* upon which the proceedings and transactions of a court are entered or drawn up by its officers, and which is then deposited in its treasury *in perpetuam rei memoriam.*' (3 Steph. Com. 583; 3 Blk. Com. 24; 2 Burr. Law Dic., tit. Record.) 'A court of record is that where the acts and judicial proceedings are enrolled in parchment for a perpetual memorial and testimony, which rolls are called the records of the court, and are of such high and super-eminent authority that their truth is not to be called in question.' In courts not of record the proceedings are not enrolled. *The privilege* of having these enrolled memorials constitutes the great leading distinction, in English and American law, between courts of record and courts not of record, or, as they are frequently designated, superior and inferior courts. 'In the United States paper has univer-

The question whether courts of justices of the peace are or are not courts of record has frequently arisen, and upon this, as upon almost every branch of the subject, the decided cases are conflicting.[1]

It will be seen that in some of the cases cited it is held that if the law of the state in which the court is situated requires it to keep a record, it should be regarded as a court of record. In others, the fact that such a court has no clerk to keep its records is conclusive against its being a court of record. But this does not seem to be a sufficient reason for excluding it from this class of courts. Where the justice is required to keep a record, and no clerk is provided, he becomes his own clerk, and no good reason appears for holding that the want of a clerk can change the character of the court.

It is sometimes held, with reference to courts of justices of the peace and other inferior courts, that they are not courts of record because they derive their authority from statute, and do not proceed according to the course of the common law.[2]

In many of the decided cases the common law is invoked to determine the dignity of the court, it being held

sally supplied the place of parchment as the material of the record, and the roll form has, on that account, fallen into disuse; but in other respects the forms of the English records have, with some modifications, been generally adopted.' (Burr. Law Dic., tit. Record.) But whether in parchment or in paper, in the roll form or otherwise, this judgment roll is what is known in law as the record—the technical record—and is what is meant by courts and law writers when they speak of records of superior courts or courts of record."

[1] Following are some of the cases in which a justices court is held to be a court of record: Fox *v.* Hunt, 12 Conn. 491; 31 Am. Dec. 760; Hooker *v.* The State, 7 Blkf. (Ind.) 272; Draggoo *v.* Graham, 9 Ind. 212, 214; Pressler *v.* Turner, 57 Ind. 56. And the following cases are to the contrary: Snyder *v.* Wise, 10 Pa. St. 157; Cox *v.* Groshong, 1 Pin. (Wis.) 307, 311.

[2] In Snyder *v.* Wise, 10 Pa. St. 157, 158, the court say, after reviewing the authorities: "But the sounder opinion is that the courts of justices of the peace are not courts of record. They do not proceed according to the course of the common law, but derive their authority wholly from statute, and must, therefore, like all other inferior tribunals, show it in every instance." Anderson's Dic. of Law, 275. See *post*, sec. 25.

that in order to constitute it a court of record its proceedings must be according to the course of the common law.[1]

This excludes all courts of inferior jurisdiction which are created, and their jurisdiction limited and controlled by statute.[2] The fact that a court has a clerk and a seal does not render it a court of record.[3] And it is held that where a court of general jurisdiction has summary powers conferred upon it which are wholly derived from statute and not exercised according to the course of the common law, its decisions must be treated like those of a court of inferior and special jurisdiction.[4]

It will be seen from the authorities cited that no definite rule can be laid down as to what is necessary to constitute a court of record in this country. In those states in which the distinction between common law and equity, with respect to matters of form and the modes of practice and procedure, has been abolished, the attempt to divide courts, in measuring the extent of their jurisdiction, into such as proceed according to the common law and those created and controlled by statute, is entirely inappropriate. And aside from this, such a test of a court of record is uncertain and unsatisfactory. The only safe and reliable rule is the one implied in the designation of the court. If a court is required by law to keep a record of its proceedings, no matter whether by a clerk or by the judge or justice of the peace, it should be treated as just what it really is, a court of record.[5]

[1] "A court of record is a judicial, organized tribunal, having attributes and exercising functions independently of the person of the magistrate designated generally to hold it, *and proceeding according to the course of the common law.*" 4 Am. & Eng. Enc. of Law, 452; In the matter of Peter Kerrigan, 33 N. J. Law, 344; Cox *v.* Groshong, 1 Pin. (Wis.) 307; Brown *v.* Goble, 97 Ind. 88; Anderson's Dic. of Law, 275.

[2] But see on this point, *post*, sec. 25.

[3] Hutkoff *v.* Demorest, 10 N. E. Rep. 535.

[4] Furgeson *v.* Jones, 17 Or. 204; 20 Pac. Rep. 842.

[5] "It was, to be sure, the judgment of a justice of the peace that was in question, but his court must be considered as a court of record. A court that is bound to keep a record of its proceedings, and that may fine or imprison, is a court of record. A justice's court is within this definition." Hooker *v.* The State, 7 Blkf. 272, 275.

But, unfortunately, this means of distinguishing between courts of record and courts not of record has not been universally, or even generally, adopted or received as the true test, nor have we any other test by which they can be distinguished that has been generally adopted.

In some of the states this uncertainty has been removed by a direct statutory provision. In New York and some other states the code provides what courts are and what courts are not courts of record.[1]

7. Courts of general and superior and of inferior and special jurisdiction.—The distinctions between courts of general and superior jurisdiction and those which are of special and inferior jurisdiction, are not more satisfactorily determined and agreed upon than the distinctions between courts of record and courts not of record.[2]

The question whether a court belongs to one or the other of these classes is usually made to depend upon the effect of its decision when rendered. If its decision is conclusive, except upon appeal, without an affirmative showing of jurisdiction, by its proceedings or otherwise, it is a court of superior jurisdiction. If, on the other hand, nothing can be presumed in favor of its jurisdiction, and its power to act must appear on the face of its proceedings, or its decisions be treated as a nullity, it is a court of inferior jurisdiction.[3]

[1] Throop's An. Code Civ. Pro. (N. Y.), secs. 2, 3; Hutkoff *v.* Demorest, 10 N. E. Rep. 535; Code Civ. Pro. Cal., secs. 33, 34.

[2] 12 Am. & Eng. Enc. of Law, 265. "The question seems to have resolved itself into one of public policy, and whether the particular court of the limited jurisdiction ought to have extended to its judgment the sanctity of the presumptions arising from the adjudications of tribunals of general common law jurisdiction. That the underlying and controlling principle upon which the question must be decided *is simply a consideration of correct public policy*, is indicated by the language employed by the Supreme Court of Vermont in Wright *v.* Hazen, 24 Vt. 143." Ex parte Kearny, 55 Cal. 216.

[3] "The true line of distinction between courts whose decisions are conclusive if not removed to an appellate court, and those whose proceedings are nullities if their jurisdiction does not appear on their face, is this: A court which is competent, by its constitution, to decide on its own jurisdiction and to exercise it to a final judgment, without setting

But the great difficulty is to determine whether a court is one whose decision is sufficient evidence of its own jurisdiction or not. In many of the decided cases the question is made to turn upon the kindred one, discussed in the last preceding section, viz., whether the court is one of record or not. So we proceed in a circle with very unsatisfactory results. A court may be one of inferior jurisdiction in the technical sense of the term, that is, in the sense that its judgments are subject to reversal or modification by a court having appellate jurisdiction over it, and yet be a court of superior jurisdiction, as contra-distinguished from courts of inferior jurisdiction, because their powers are limited and special. In a technical sense all courts, except those of last resort, are inferior courts.[1]

Whether a court is one of general or special jurisdiction is said to depend upon whether its authority extends to a great variety of matters or only to certain specified cases.[2]

And a court of inferior or special jurisdiction can thus be ascertained if its authority is limited to certain specified cases. Such a court is treated as one of inferior jurisdiction because, in order to authorize it to act, it must appear upon the face of its proceedings that the case before it is one of the specified cases over which it is given authority.[3]

forth in their proceedings the facts and evidence on which it is rendered, whose record is absolute verity, not to be impugned by averment or proof to the contrary, is of the first description; there can be no judicial inspection behind the judgment save by appellate power. A court which is so constituted that its judgment can be looked through for the facts and evidence which are necessary to sustain it; whose decision is not evidence of itself to show jurisdiction and its lawful exercise, is of the latter description." Grignon *v.* Astor, 2 How. 319, 341; Borden *v.* State, 11 Ark. 519; 54 Am. Dec. 217.

[1] McCormick *v.* Sullivant, 10 Wheat. 192; Borden *v.* State, 11 Ark. 519; 54 Am. Dec. 217, 232; 12 Am. & Eng. Enc. of Law, 266; Anderson's Dic. of Law, 275.

[2] "Some courts are of general jurisdiction, by which is meant that their authority extends to *a great variety of matters;* while others are only of special and limited jurisdiction, by which it is understood that they have authority extending only to *certain specified cases.*" Cooley Const. Lim., 5th ed., 502.

[3] *Post*, secs. 23, 25; Cooley Const. Lim., 5th ed., 502.

In the sense that a court which has jurisdiction only in specified cases is one of special, and therefore of inferior jurisdiction, all of the federal courts, except the supreme court, have been held to be inferior courts, on the ground that they have no general, or common law jurisdiction, but only such jurisdiction as is specially conferred upon them by positive law.[1] But, as we shall see when we come to consider the question of jurisdiction,[2] they are not so in the sense, or to the extent that their proceedings, outside of their jurisdiction, are nullities, or that the facts affirmatively appearing on the face of their proceedings may be disproved and disregarded.[3] Nor can their judgments be attacked except upon appeal, or writ of error, where their authority to act does not affirmatively appear on the face of their proceedings.[4]

So it will not do to rely upon the distinction between courts of general and those of special or limited jurisdic-

[1] Cooley's Const. Lim., 5th ed., 27; McCormick *v.* Sullivant, 10 Wheat. 192; Hahn *v.* Kelly, 34 Cal. 413; 94 Am. Dec. 742; United States *v.* Southern Pac. R. Co., 49 Fed. Rep. 300.

[2] *Post*, secs. 23, 25.

[3] "But this reason proceeds upon an incorrect view of the character and jurisdiction of the inferior courts of the United States. They are all of limited jurisdiction; but they are not on that account inferior courts, in the technical sense of those words, whose judgments, taken alone, are to be disregarded. If the jurisdiction be not alleged in the proceedings, their judgments and decrees are erroneous, and may, upon a writ of error or appeal, be reversed for that cause. But they are not absolute nullities." McCormick *v.* Sullivant, 10 Wheat. 192, 199.

[4] "But the present judgment was neither fraudulent on its face nor even voidable. Had it been rendered on the special counts alone, it might have been voidable by a writ of error for not alleging jurisdiction in the pleadings. (See *ante*, 2 How. 243; Capron *v.* Van Norden, 2 Cranch, 126.) But it has been repeatedly settled that even then, without any plea to the jurisdiction, and after a verdict for the plaintiff on the general issue and final judgment, it is not a nullity, but must be enforced till duly reversed. (Kemp's Lessee *v.* Kennedy, 5 Cranch, 185, and Skillern's Executors *v.* May's Executors, 6 Cranch, 267; McCormick *v.* Sullivant, 10 Wheat. 192; Voorhees *v.* Bank of United States, 10 Peters, 449; Meyer *v.* Zane, 3 Ohio, 306; Wilde *v.* Commonwealth, 2 Metc. 408; Hopkins *v.* Commonwealth, 3 Metc. 460.) Because it would be a judgment rendered by a court not of *inferior*, but only limited jurisdiction, and the merits would have been investigated and decided by consent." Bank of United States *v.* Moss, 6 How. 31, 39.

tion, in the effort to distinguish between courts of superior and those of inferior jurisdiction.

It must be apparent from what has been said, and the authorities cited, that the line of demarkation between courts of superior and those of inferior jurisdiction has never been definitely determined, and perhaps never will be. It seems that it must be left to a separate decision, as affecting each court, where there is any doubt as to the class to which it belongs, by the court of last resort in the state where it is situated.[1]

[1] In the case of Hahn *v.* Kelly, 34 Cal. 391, 411 (94 Am. Dec. 742), this question received careful attention. In that case the court said: "Not universally, but frequently, we find the words 'superior courts' accompanied by the phrase 'proceeding according to the course of the common law.' What does this phrase mean? Does it operate as a limitation upon the rule? Does it mean that when a superior court is proceeding according to the rules and practice of the common law its jurisdiction will be presumed; but that when it is proceeding according to rules and practice prescribed by a statute its jurisdiction will not be presumed, but must be shown? Does it mean that the same court is superior or inferior according to circumstances—that it is superior when it works according to common law, and inferior when it works according to statute law; if it does, what is the reason upon which the distinction which it makes is founded? Unless those who have used the expression can give us a reason for the distinction which it seems to make, which reason is satisfactory, we must conclude that there is none, and that they have used the expression without license. We have been unable to find any reason for such a distinction, none has been suggested, and every reason which occurs to us points the other way. . . . When first employed its use was harmless, for there was then no mode of procedure except such as the common law prescribed; but its continued use, where the modes of the common law have been superseded, is mischievous. Upon an examination of the books it will be found that our most accurate writers do not use the expression when speaking of the present or cognate rules. The only distinction which they make is represented by the words 'superior' and 'inferior,' 'limited' and 'general,' and such, in our judgment, is the only distinction which exists; and there is no satisfactory reason for a further distinction founded upon a supposed departure from the modes in vogue at common law, for the purpose of obtaining jurisdiction. . . . The doctrine contended for, pushed to its ultimate conclusion, would abrogate the rule in this state, and dwarf all our courts to the grade of inferior courts at common law. The jurisdiction of all our courts is special and limited, as defined by the constitution, and they do not proceed according to the course of the common law, but according to the course of the practice

The confusion that exists in the decided cases on this subject arises, to some extent, from a failure, in some of the cases, to distinguish between courts of *limited* and courts of *special* jurisdiction; and yet the distinction, although not easily defined, is clear enough. In a sense, every court is one of limited jurisdiction, both of the subject-matter and of the person. The limitations imposed upon the state courts are usually found in the constitutions, and the codes or statutes, and confine the jurisdiction to certain classes of business, and within certain territorial limits. The extent of the jurisdiction of different courts exercising their powers may be different, and that of one court may be much more general and extensive than that of another, but the jurisdiction of all of the courts of this kind, although statutory, may be general.

The jurisdiction of the United States courts is limited, but it is not for that reason special. The great difference between the state courts and the United States courts is that the jurisdiction of the former may exist without, but is limited by, statute, and the latter is dependent entirely upon express provisions of law for their jurisdiction, except as to those inherent powers that belong to every court of general jurisdiction, and need not be given, and can not be taken away, by statute.

A court of special, as distinguished from one of limited jurisdiction, is one which has a special jurisdiction for a particular purpose, or one clothed with specific powers for the performance of specific duties beyond which it has no authority, and these specific powers to be exercised in a summary way.[1]

act." In this case the court concludes that the dividing line should be between courts of record and courts not of record.

[1] Den *v.* Hammel, 3 Harrison (N. J.), 78, 79; Kenney *v.* Greer, 13 Ill. 432, 438; 54 Am. Dec. 439.

In Kenney *v.* Greer, *supra*, the court said: "The term *limited* is ambiguous, and is often confounded with the word special. Every court is limited in its jurisdiction by the constitution and laws. This court is limited to appellate jurisdiction only except in certain specified cases. The true distinction is between such courts as possess a general, and such as have only a special jurisdiction, for a particular purpose, or clothed

with special powers for the performance of specific duties, beyond which they have no manner of authority, and these specific powers to be exercised in a summary way, either by a tribunal already existing for general purposes, or else by persons appointed for the special purpose."

In Den *v.* Hammel, *supra*, it was said: "I apprehend the term '*limited jurisdiction*,' to be be somewhat ambiguous; and that the books sometimes use it without due precision. Our supreme court is *limited*, by acts of the legislature, so likewise is the court of common pleas, and the newly constituted circuit courts, yet each of them exercises a general jurisdiction. The word *limited* seems to be used sometimes carelessly instead of the word *special;* for I take the true distinction between courts to be, such as possess a *general*, and such as have only a *special* jurisdiction, for a particular purpose, or clothed with *special powers* for the performance of specific duties, beyond which they have no manner of authority; and these special powers to be exercised in a summary way, either by a tribunal already existing for general purposes, or else by persons appointed or to be appointed in some definite form. Such tribunals with special powers for adjudicating in particular cases, under the various names of commissioners, surveyors, appraisers, committees, directors, overseers, and the like, abound in our statute book, little or in nowise relating to the general administration of justice, whose modes of proceeding are prescribed in the statutes by which they are erected; and unless their proceedings, on the face of them, show a compliance with the directions required by the statute under which they act, it never could be known whether they acted within their jurisdiction, or exceeded it. And each case cited in support of the plaintiff's position was that of a tribunal empowered for a *special* purpose; and that alone; as to liberate from confinement certain prisoners, to make an inquest concerning certain water, or to inquire respecting the value of certain land, and there terminated their functions."

CHAPTER II.

GENERAL PRINCIPLES AFFECTING JURISDICTION.

8. Jurisdiction defined.
9. Different kinds of jurisdiction.
10. How jurisdiction conferred and regulated.
11. How jurisdiction obtained.
12. Jurisdiction of the subject-matter.
13. Jurisdiction of the person.
14. Jurisdiction *in rem*.
15. Territorial jurisdiction.
16. Jurisdiction as to amount.
17. Exclusive and concurrent jurisdiction.
18. Assistant jurisdiction.
19. Terms of court as affecting jurisdiction.
20. Special and inferior jurisdiction; how obtained and exercised.
21. Original and appellate jurisdiction.
22. When and how question of jurisdiction may be raised.
23. How jurisdiction proved and disproved.
24. How jurisdiction may be lost, taken away, or suspended.
25. Presumptions in favor of jurisdiction.
26. Effect of want of jurisdiction.
27. Inherent powers of courts.
28. Powers of illegal and *de facto* courts.
29. Constitutional limitations of jurisdiction.
30. Jurisdiction in summary proceedings.
31. Control of attorneys.

8. JURISDICTION DEFINED.—Jurisdiction has been defined to be the power to hear and determine a cause.

"The power to hear and determine a cause is jurisdiction. It is *coram judice* whenever a case is presented which brings this power into action. If the petitioner states such a case in his petition, that on a demurrer the court would render judgment in his favor, it is an undoubted case of jurisdiction."[1]

This definition is generally accepted as sufficiently broad

[1] United States *v.* Arredondo, 6 Pet. 691, 709; Smiley *v.* Sampson, 1 Neb. 70; Elliott's App. Pro., sec. 12.

and comprehensive.[1] But care must be taken not to give the term "power to determine" too broad a construction. Undoubtedly where the court has jurisdiction of the subject-matter of the action, and of the parties, it has jurisdiction to decide the case rightly or wrongly. If the judgment rendered is erroneous, it may be attacked by appeal or writ of error, but it is not for that reason void or subject to collateral attack.[2] But a judgment may be both erroneous and void. The court may have jurisdiction of the subject-matter, and of the parties, and yet the particular judgment rendered in the particular case may be void because in excess of the jurisdiction of the court. The judgment rendered must be one that is authorized by law in the *class* of cases to which the case before the court belongs. Therefore, where the validity of a judgment is in question, it must appear that the court had power to render that particular judgment in that case, without reference to the rights of the parties before it.[3] It does not fol-

[1] Freeman on Judg., sec. 118; 1 Works' Ind. Prac. and Pl., sec. 4; Board, etc., *v.* Markle, 46 Ind. 96; Lantz *v.* Maffett, 102 Ind. 23, 28, 26 N. E. Rep. 195; Quarl *v.* Abbett, 102 Ind. 233, 239; 1 N. E. Rep. 476; Hickman *v.* O'Neal, 10 Cal. 292; Ex parte Bennett, 44 Cal. 84.

[2] *Post*, sec. 23.

[3] "The doctrine invoked by counsel, that where a court has once acquired jurisdiction, it has a right to decide every question which arises in the cause, and its judgment, however erroneous, can not be collaterally assailed, is undoubtedly correct as a general proposition, but like all general propositions, is subject to many qualifications in its application. All courts, even the highest, are more or less limited in their jurisdiction. They are limited to particular classes of actions, such as civil or criminal; or to particular modes of administering relief, such as legal or equitable; or to transactions of a special character, such as arise on navigable waters, or relate to the testamentary disposition of estates; or to the use of particular process in the enforcement of their judgments. Though the court may possess jurisdiction of a cause, of the subject-matter, and of the parties, it is still limited in its modes of procedure, and in the extent and character of its judgments. It must act judicially in all things, and can not then transcend the power conferred by the law. If, for instance, the action be upon a money demand, the court, notwithstanding its complete jurisdiction over the subject and parties has no power to pass judgment of imprisonment in the peniten-

low, therefore, necessarily, that because the court has the power to hear and determine the *cause*, that it has the power to render the judgment brought in question. To this extent the definition given is too broad, and is for that reason inaccurate. If any particular act of the court is in question, it must have had the power, not only to hear and determine the cause, but to render the judgment, or do the act, brought in question. That the court ought not to have rendered such a judgment, as between the parties to the action, does not affect its validity if the judgment is one authorized by law to be rendered in such an action. No matter how erroneous or unjust the judgment rendered may be, if it is one that might, under any condition of the evidence, be rendered in an action of that kind, it is not invalid or subject to collateral attack. The remedy is by appeal or writ of error.[1]

tiary upon the defendant. If the action be for a libel or personal tort, the court can not order in the case a specific performance of a contract. If the action be for the possession of real property, the court is powerless to admit in the case the probate of a will. Instances of this kind show that the general doctrine stated by counsel is subject to many qualifications. The judgments mentioned given in the cases supposed, would not be merely erroneous, they would be absolutely void; because the court in rendering them would transcend the limits of its authority in those cases. . . . So a departure from established modes of procedure will often render the judgment void; thus the sentence of a person charged with felony, upon conviction by the court, without the intervention of a jury, would be invalid for any purpose. The decree of a court of equity upon oral allegations, without written pleadings, would be an idle act, of no force beyond that of an advisory proceeding of the chancellor. And the reason is that the courts are not authorized to exert their power in that way. The doctrine stated by counsel is only correct when the court proceeds, after acquiring jurisdiction of the cause, *according to the established modes governing the class to which the case belongs, and does not transcend, in the extent or character of its judgment, the law which is applicable to it.* The statement of the doctrine by Mr. Justice Swayne, in the case of Cornell *v.* Williams, reported in the 20 Wallace, is more accurate. 'The jurisdiction,' says the justice, 'having attached in the case, every thing done *within the power of that jurisdiction*, when collaterally questioned, is held conclusive of the rights of the parties, unless impeached for fraud.'" Windsor *v.* McVeigh, 93 U. S. 282. See also Ex parte Lange, 18 Wall. 163; Bigelow *v.* Forrest, 9 Id. 351; In re Pierce, 44 Wis. 411.

[1] *Post*, sec. 23; Freeman on Judg., sec. 135; Chase *v.* Christianson,

"Jurisdiction of the subject-matter is power to adjudge concerning the general question involved, and is not dependent upon the state of facts which may appear in a particular case, arising, or which is claimed to have arisen under that general question."[1]

The definitions given by different courts vary in their language, but are practically the same as the one given above. "To have jurisdiction is to have power to inquire into the fact, to apply the law, and to declare the punishment, *in a regular course of judicial proceeding*."[2]

"Jurisdiction is the power to hear and determine the subject-matter in controversy between parties to a suit; to adjudicate, or exercise any judicial power over them; the question is whether, on the case before a court, their action is judicial or extra-judicial, with or without the authority of law to render judgment, or decree, upon the rights of the litigant parties. If the law confers the power to render a judgment, or decree, then the court has jurisdiction; what shall be adjudged or decreed between the parties, and with which is the right of the case, is judicial action by hearing and determining it."[3]

This last definition would be accurate enough, in most cases, but it may mislead. Undoubtedly the statement that, under the circumstances enumerated, the court would have jurisdiction *of the action*, and would have power and authority to render any judgment authorized by law in *that class of cases*, is correct; but there may still be a want of jurisdiction to render a particular kind of judgment, because such judgment is not authorized by law in such a case as the one before the court.

"The officer is judge in the cases in which the law has empowered him to act, and in respect to persons lawfully brought before him; but he is not judge when he assumes to decide cases of a class which the law withholds from his cognizance, or cases between persons who are not either

41 Cal. 253; Sheldon *v.* Newton, 3 Ohio St. 499; Hunt *v.* Hunt, 72 N. Y. 224; 28 Am. Rep. 129.

[1] Hunt *v.* Hunt, 72 N. Y. 229; 28 Am. Rep. 129.

[2] Hopkins *v.* Commonwealth, 44 Mass. 462.

[3] State of Rhode Island *v.* State of Massachusetts, 12 Pet. 718; People *v.* Sturtevant, 9 N. Y. 266; 59 Am. Dec. 536.

actually or constructively before him for the purpose. Neither is he exercising the judicial function when, *being empowered to enter one judgment, or make one order, he enters or makes one wholly different in nature.* When he does this he steps over the boundary of his judicial authority, and is as much out of the protection of the law, *in respect to the particular act*, as if he held no office at all. This is the general rule. Jurisdiction *in a judge* may be defined as the authority of law to act officially in the matter then in hand."[1]

"Jurisdiction in courts is the power and authority to declare the law. The very word, in its origin, imports as much; it is derived from *juris* and *dico*—I speak by the law. And that sentence ought to be inscribed in living light on every tribunal of criminal power. It is the right of administering justice through the laws, by the means which the law has provided for that purpose. But here the mode and the manner of administering the justice of the country was not provided or prescribed by the law, and is directly prohibited by it. There was, therefore, no jurisdiction."[2]

"Jurisdiction may be defined to be the right to adjudicate concerning the subject-matter in the given case. To constitute this there are three essentials: First, the court must have cognizance of the class of cases to which the one to be adjudged belongs. Second, the proper parties must be present. And, third, *the point decided must be in substance and effect within the issue.*"[3]

Here is an element in the definition of jurisdiction not contained, it is believed, in the definitions usually given, and certainly the correctness of this decision, so far as it may be regarded as laying down a general rule, must be open to serious question. In a case in which a judgment is taken by default, no doubt it would be void, but not where the defendant appears and defends the action.[4] It would be a most radical departure from well settled principles to hold that in every instance where the judgment or decree of a court is outside of the

[1] Cooley on Torts, 417; Jones *v.* Brown, 54 Ia. 79.

[2] Mills *v.* Commonwealth, 13 Pa. St. 630.

[3] Munday *v.* Vail, 34 N. J. Law, 422.

[4] But see on this point Blondeau *v.* Snyder, 31 Pac. Rep. 591.

issues it is void for want of jurisdiction in the court to render it. A want of jurisdiction may appear from the failure of the declaration or complaint to allege such facts as will set the jurisdiction of the court in motion.[1] But this is not because no issue is presented, but because jurisdiction of the subject-matter does not appear.[2]

It may be, and no doubt is true as said in this case, that a decree of divorce rendered between two of the parties in an ordinary foreclosure case would be invalid, but it would not be void because not within the issues, but because no such decree could be rendered in a foreclosure suit. Such a case would fall clearly within the rule laid down above that a judgment not authorized by law in the class of cases, of which the case before the court is one, is void for want of jurisdiction. And even this rule must be difficult of application under the code system of administering justice. Under the extreme views sometimes

[1] Spoors *v.* Coen, 44 Ohio St. 497; 9 N. E. Rep. 132.

[2] In Munday *v.* Vail, *supra*, the court, after giving the above definition, say: "That a court can not go out of its appointed sphere, and that its action is void with respect to persons who are strangers to its proceedings, are propositions established by a multitude of authorities. A defect in a judgment arising from the fact that the matter decided was not embraced within the issue, has not, it would seem, received much judicial consideration. And yet I can not doubt that, upon general principles, such a defect must avoid a judgment. It is impossible to concede that because A and B are parties to a suit, that a court can decide any matter in which they are interested, whether such matter be involved in the pending litigation or not. Persons by becoming suitors do not place themselves, for all purposes, under the control of the court, and it is only over these particular interests which they choose to draw in question that a power of judicial decision arises. If in an ordinary foreclosure case, a man and his wife being parties, the court of chancery should decree a divorce between them, it would require no argument to convince every one that such decree, so far as it attempted to affect the matrimonial relation, was void; and yet the only infirmity in such a decree would be found, upon analysis, to arise from the circumstance that the point decided was not within the substance of the pending litigation. In such a case the court would have acted within the field of its authority, and the proper parties would have been present, the single but fatal flaw having been the absence from the record of any issue on the point determined. The invalidity of such a decree does not proceed from any mere arbitrary rule, but it rests entirely on the ground of common justice." See to the same effect, Reynolds *v.* Stockton, 43 N. J. Eq. 211; 10 Atl. Rep. 385; Reynolds *v.* Stockton, 140 U. S. 250; 11 Sup. Ct. Rep. 773.

taken that the distinction between different kinds of actions have been abolished for all purposes, it could not be said that a judgment in a given case must be held invalid when no such judgment could lawfully be rendered in the *class* of cases to which it belongs. But the divisions of actions at law and in equity can not be thus brushed aside. So far as the matter of form is concerned all common law and equity actions and suits have been consolidated into one denominated a "civil action," but the distinction between these several kinds of actions, in respect to matters of *substance*, still remains and must have its effect in this as in many other matters affecting the substance and merits of a controversy, and not the mere matter of form or procedure.[1]

A court may have jurisdiction to hear and determine a cause, and yet, as we have seen, some particular act done may be outside of or in excess of its jurisdiction. Every movement of the court, within its power to act, is an exercise of its jurisdiction.[2] And "the authority to hear and determine a cause is jurisdiction to try and decide all of the questions involved in the controversy."[3]

"Jurisdiction has often been said to be 'the power to hear and determine.' It is, in truth, the power to do both or either, to hear without determining, or to determine without hearing."[4]

Where jurisdiction of the person of a defendant is acquired by publication, and the declaration or complaint is thereafter amended in such way as to allege a different cause of action and without any new notice being given a judgment is taken by default, the judgment is void.[5]

[1] Vail *v.* Jones, 31 Ind. 467, 473.

[2] Hopkins *v.* The Commonwealth, 3 Metc. 462; State of Rhode Island *v.* Massachusetts, 12 Pet. 718.

[3] Quarl *v.* Abbott, 102 Ind. 239; 1 N. E. Rep. 476.

[4] Ex parte Bennett, 44 Cal. 88. A very full collection of the authorities on this subject will be found in 12 Am. & Eng. Enc. of Law, 244 *et seq.* The question as to what is necessary to give a court jurisdiction of the subject and of the parties to an action will be considered in another place. (*Post*, secs. 12, 13.)

[5] Stuart *v.* Anderson, 70 Tex. 588; 8 S. W. Rep. 295, 300.

So the judgment of a court upon a subject of litigation within its jurisdiction, but not brought before it by any statement or claim of the parties, is null and void, and may be collaterally impeached.[1]

9. Different kinds of jurisdiction.—The most important division of jurisdiction is that which separates the common law and equitable jurisdiction of courts. Both of these are fully considered in another place.[2]

Under the system of practice and pleadings which kept these different kinds of jurisdiction separate and distinct, not only with respect to the courts in which they were administered, but with respect, also, to the mode of procedure and the remedies to be administered, this classification was much more important, as affecting the law of jurisdiction, than it is at the present day. But under the codes, the common law and equity principles and procedure necessarily influence not only the remedies to be administered but the means by which the relief may be obtained. There is an inherent and essential difference between common law and equity rights and remedies that permeates every branch of the law under the codes as well as under the old systems of procedure. It is well, therefore, for the student and the lawyer to study carefully the jurisdiction of the courts as it existed in the common law and equity courts in England and in this country before the enactment of the codes. This is necessary not only because the practice and pleadings under the codes can not be mastered without such knowledge, but for the further reason that in the federal courts, and in the courts of some of the states, these separate jurisdictions are still maintained in practice.

The jurisdiction exercised by the common law and equity courts differs mainly in the remedies that may be administered by each. In a court of law, the injured

[1] Spoors *v.* Coen, 44 Ohio St. 497; 9 N. E. Rep. 132. *Post*, sec. 11.

[2] *Post*, secs. 65 et seq.

party is confined to the recovery of money or specific real or personal property, whether his cause of action arises *ex contractu* or *ex delicto*, and no cause of action arises until the wrong complained of has been committed.[1]

The jurisdiction of a court of equity is in great measure preventive in its nature. It not only has jurisdiction to prevent a party from doing a wrongful act to the injury of another, but it may compel him to do what is right instead of giving the other party concerned relief in damages for his failure to do so. The jurisdiction of the common law courts were exercised in certain well known common law actions. These fixed actions measured and prescribed the limits of their jurisdiction. It was mainly the inadequacy of the remedies thus administered that brought courts of equity into existence and gave rise to the vast and important jurisdiction these courts exercise at the present day. The jurisdiction of the equity courts can not be ascertained and stated with as much accuracy and precision as that of the common law courts, because it can not be done by a mere reference to the particular kinds of actions, maintainable therein, by name. But some of the principal cases or suits of exclusive equitable jurisdiction may be mentioned, viz.: To compel the rescission, cancellation, or delivery up of agreements, securities, or deeds; to reform written instruments and to correct mistakes therein; for specific performance of contracts, awards, and the like; to rescind contracts; to set aside conveyances made to defraud, hinder, or delay creditors; to probate or contest wills; for injunctive relief; to foreclose or redeem mortgages; interpleader; to enforce vendors' or other liens on lands; to establish or enforce trusts; seeking the construction of wills and the enforcement of trusts under them; actions for divorce or to nullify or affirm marriages; to compel an election between inconsistent rights or claims; to marshal assets or securities; for dissolution of partnership, and to settle accounts of same; to compel payment of lost bills of exchange or promissory notes, negotiable

[1] Adams' Eq. Int., p. xxxiv.

by delivery merely; to quiet title to real estate; to review judgments or decrees, subrogation, and substitution.[1] To these may be added what is sometimes termed the assistant jurisdiction of courts of equity, which is exercised by bill of discovery, by the examination of witnesses *de bene esse*, or out of the jurisdiction of the court, and by the perpetuation of testimony.[2]

In chancery, jurisdiction is divided into *ordinary*, wherein the common law is observed, and *extraordinary*, that of equity and good conscience, and the court of chancery into two tribunals, one with ordinary and the other with extraordinary jurisdiction.[3]

These two jurisdictions were originally administered in England in separate and distinct courts.[4]

This gave rise to conflicts of jurisdiction and complications that have, to a great extent, been modified and avoided by vesting both legal and equitable jurisdiction in the same courts, and by making the procedure the same whether the cause of action be legal or equitable. This has been done in England by the adoption of the judicature acts, which vest the whole jurisdiction in one court.[5]

It is true, as we have shown elsewhere,[6] that the legal and equitable jurisdiction of this one court is kept separated by the separation of the court into divisions corresponding to the old common law and equity courts with jurisdiction in such divisions similar to the former courts of the same name, but the court is still but one court, with

[1] 1 Work's Ind. Prac. & Pl., sec. 827. In a note to Cooley's Blackstone, Book 3, p. 426, the general heads of equity jurisdiction are said to include: fraud, accident, mistake, account, infants, lunatics, imbeciles, etc., married women, specific performance, foreclosure of mortgage, dower, partition, interpleader, trusts, bills of peace, bills *quia timet*, and injunction. See also the introduction to Adams' Equity for a clear and precise statement of the jurisdiction of courts of equity.

[2] *Post*, sec. 18; Bouv. Law Dic., title, Jurisdiction.

[3] Anderson's Dic. of Law, 164, 581.

[4] 18 Am. Law Rev. 575.

[5] *Ante*, sec. 3; 18 Am. Law Rev. 575, 582; 25 Am. Law Rev. 1; Wilson's Jud. Acts, 2, sec. 3.

[6] *Ante*, sec. 3.

jurisdiction over all classes of cases, and with power to administer all of the remedies that might have been administered by the several courts consolidated into it, and the only effect of bringing an action in the wrong division of the court is that it may be ordered transferred to the proper division.[1]

In the several states in this country which have adopted codes it is provided, in express terms, that the distinction between actions at law and suits in equity are abolished, and a single action, denominated a civil action, is provided for in their stead.[2] And the several actions known to the common law and equity practice being thus consolidated into one, jurisdiction over all of them is vested in one and

[1] In an article in the American Law Review, by Mr. Tempany, it is said: "On looking at the jurisdiction of the several divisions, it may very possibly be said that as each division possesses a peculiar and apparently exclusive jurisdiction, the alterations endeavored to be effected by the judicature acts can scarcely be looked upon in the light of consolidation. But it must be borne in mind that the consolidation sought to be effected is rather the fusion of law and equity rather than of the courts of common law and chancery, and though the latter courts may be said still virtually to exist in the names of the 'chancery division' and the 'queen's bench division,' it must be observed that such a thing as a 'court of equity' no longer continues, the queen's bench division being now just as much a court of equity as the chancery division itself; and it is in this respect that the greatest fusion has taken place. Now a plaintiff is left entirely free to choose the division of the court in which he will bring his action, provided that it does not fall within the category of those assigned to a particular division; and even though, by mistake, he assigns his action to a wrong division, the worst that can befall him is to have it transferred, in the stage at which it is found, to the division in which by right it should have been brought, and it is quite within the discretion of a judge not even to transfer it, but to allow the action to proceed in the division in which it has been commenced. Convenience is the sole object of assigning special business to each division, and exclusive jurisdiction in that business is not thereby given to the particular division. It would therefore be quite erroneous to say that the power to decree specific performance, partition or redemption, or foreclosure of mortgages, was exclusively within the jurisdiction of the chancery division, for all the other divisions have the same power in an equal degree. Law and equity are now concurrently administered, and equity prevails in all cases where the rules of law and equity conflict." 18 Am. Law Rev. 584.

[2] Pom. Rem., sec. 28.

the same court, and the procedure generally is the same whether the action would formerly have been one at law or in equity.[1]

Perhaps the most material distinction maintained in most of the states between common law and equity actions is as to the manner in which each shall be tried, the right of trial by jury being continued in common law cases and denied in those formerly cognizable in courts of equity.

In many cases the jurisdiction of the law and equity courts were concurrent, the only distinguishing feature being the remedy to be administered.[2]

Besides, the provisions of the codes abolishing the distinction between legal and equitable actions, many of the actions that were formerly cognizable in courts of equity have ceased to be distinctively equitable and become statutory. This may be said of actions for partition, for divorce, the settlement and protection of the estates of infants, lunatics and others, which are governed entirely by positive statutory provisions. Being provided for and regulated entirely by statute, and administered in and by courts exercising general jurisdiction of all actions and special proceedings of whatever nature under the same form and procedure, except as the same are varied and controlled by statute, they are no longer looked upon or treated as equitable in their nature for any purpose. As to such equitable remedies as injunction, specific performance, and the like, they are as much equitable suits now as they ever were, so far as matter of substance is concerned, but they are not distinguishable, in the code states, in matters of form, or as respects the courts by which they are to be administered, from common-law actions.

The equitable jurisdiction of discovery, the perpetuation of testimony and the like, once so important, has been almost entirely superseded by simple and effectual statutory provisions for the taking of the testimony of parties and witnesses in advance of the trial, and in advance of the

[1] Pom. Rem., sec. 28. [2] 1 Work's Ind. Pr. & Pl., sec. 826.

commencement of the suit, and in some of the states, for the submission of interrogatories by one of the parties to a suit to be answered by the other under oath to be used as evidence at the trial. There are other subordinate divisions of jurisdiction applicable to both of these classes. They are original and appellate, exclusive and concurrent, general and inferior or special, of the subject-matter and of the person, assistant and consultative and territorial.[1]

It is usually held that courts of record, unless it is otherwise provided by law, have common law jurisdiction.[2]

"The term common law jurisdiction is capable of no other meaning than jurisdiction to try and decide causes which were cognizable by the courts of law, under what is known as the common law of England. Our judicial system having been modeled chiefly after that of England, we have adopted the nomenclature which prevailed in her courts."[3]

10. How jurisdiction conferred and regulated.—Jurisdiction is conferred and regulated in this country almost exclusively by the constitution of the United States and acts of congress, in case of the federal courts, and by the consti-

[1] "Jurisdiction is original when it is conferred on the court in the first instance, which is called *original jurisdiction;* or it is *appellate,* which is when an appeal is given from the judgment of another court. Jurisdiction is also *civil* where the subject-matter to be tried is not of a criminal nature; or *criminal* where the court is to punish crimes. Some courts and magistrates have both civil and criminal jurisdiction. Jurisdiction is also concurrent, exclusive, or assistant. *Concurrent jurisdiction* is that which may be entertained by several courts. It is a rule that in cases of concurrent jurisdiction that which is first seized of the case shall try it to the exclusion of the other. *Exclusive jurisdiction* is that which has alone the power to try or determine the suit, action, or matter in dispute. *Assistant jurisdiction* is that which is afforded by a court of chancery in aid of a court of law; as, for example, by a bill of discovery, by the examination of witnesses *de bene esse,* or out of the jurisdiction of the court; by the perpetuation of the testimony of witnesses and the like." Bouv. Dic., title, Jurisdiction; 12 Am. & Eng. Enc. of Law, 251.

[2] In the matter of Conner, 39 Cal. 98; 2 Am. Rep. 427; Ex parte Gladhill, 8 Metc. 168. As to what are courts of record, see *ante* secs. 6, 7.

[3] In the matter of Conner, 39 Cal. 100; 2 Am. Rep. 427.

tutions and statutes of the several states in case of the state courts. But it does not follow from this that the common law and equity have nothing to do with fixing the jurisdiction of the courts. When jurisdiction is conferred by the constitution, or by statute, upon the courts of superior jurisdiction, it is generally provided that such courts shall have jurisdiction in all cases at law and in equity, or in one or the other, as the case may be, without attempting to enumerate, specifically, the cases over which jurisdiction shall extend. So with reference to admiralty and maritime cases.

Thus, for example, the constitution of the United States provides that "the judicial power shall extend to all cases in law and equity, arising under this constitution, the laws of the United States and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction," etc.[1] And courts of general jurisdiction have and exercise common law jurisdiction.[2] The grant of jurisdiction must proceed from competent authority. It can not be conferred by an unconstitutional act of the law-making power.[3] Nor can jurisdiction of the subject-matter be given by consent of the litigant parties.[4] Jurisdiction of the state courts is derived from the constitution and laws of the states, and can not be conferred by congress or by the laws of another state.[5]

Jurisdiction may be exercised according to the rules of the common law, or by special direction, or informally.[6] And the specific manner in which jurisdiction shall be exercised may be provided by statute, and if so it can be exercised in no other way.[7]

In the absence of some statutory provision authorizing it, none but judges, or other judicial officers, can exercise

[1] Const. U. S., Art. III, sec. 2.
[2] Wells' Jur., sec. 67.
[3] Freeman on Judg., secs. 119, 120.
[4] *Post*, sec. 12.
[5] Missouri Riv. Tel. Co. *v.* First Nat'l Bank, 74 Ill. 217.
[6] Smiley *v.* Sampson, 1 Neb. 70.
[7] *Post*, sec. 20.

judicial functions, even with the consent of parties interested.[1] But some such statutory provisions exist.[2]

In some of the states statutory provisions authorizing the holding of courts by attorneys have been held to be unconstitutional.[3]

11. How jurisdiction obtained.—The power to hear and determine a cause is conferred by law, as we have seen.[4] But something is necessary to put this power in motion, and call for the action of the court. This can not be done, with respect to the subject-matter, by the mere consent of the parties.[5]

Jurisdiction of the subject-matter is obtained by the filing of such a pleading or petition as will bring the action within the authority of the court.[6]

It is not necessary that the pleading shall state a cause of action, or be so drawn as to withstand a demurrer, but it must be sufficient to show that the subject-matter of the action is within the jurisdiction of the court.[7] By this is not meant that it must be alleged in terms that the court

[1] *Ante*, sec. 1; Hoagland *v.* Creed, 81 Ill. 506; Bishop *v.* Nelson, 83 Ill. 601; Meredeth *v.* The People, 84 Ill. 479.

[2] Thus in Indiana provision is made for the selection of an attorney to hold court. Rev. Stat. Ind. 1881, sec. 1364. And in California, to try cases with the consent of parties. Code Civil Pro., sec. 72.

[3] Van Slyke *v.* Trempealeau County F. M. F. Ins. Co., 39 Wis. 390; 20 Am. Rep. 50.

[4] *Ante*, sec. 10.

[5] Free. on Judg., sec. 120; Mills *v.* Commonwealth, 13 Pa. St. 629; Horton *v.* Sawyer, 59 Ind. 587; Doctor *v.* Hartman, 74 Ind. 221; *post*, sec. 12.

[6] "The power to hear and determine a cause is jurisdiction; and it is *coram judice* whenever a case is presented which brings this power into action. But before this power can be affirmed to exist, it must be made to appear that the law has given the tribunal capacity to entertain the complaint against the person or thing sought to be charged or affected; *that such complaint has actually been preferred*, and that such person or thing has been properly brought before the tribunal to answer the charge." Sheldon *v.* Newton, 3 Ohio St. 499; Spoors *v.* Coen, 44 Ohio St. 502; 9 N. E. Rep. 132; Munday *v.* Vail, 34 N. J. Law, 422; Callen *v.* Ellison, 13 Ohio St. 446; 82 Am. Dec. 448.

[7] Campbell *v.* West, 86 Cal. 200; 24 Pac. Rep. 1000; McKeever *v.* Bail 71 Ind. 404.

has jurisdiction. Usually the statement of facts shows the case to be one within the jurisdiction of the court. And it must be remembered that if a court is one of general jurisdiction, its jurisdiction over the subject-matter will be presumed. And where it does not affirmatively appear on the face of the complaint that the subject-matter is not within the jurisdiction of the court, it must be shown by answer.[1] It is otherwise if the court is one of inferior or special jurisdiction.[2]

It is the pleading on the part of the plaintiff that determines whether the court has jurisdiction or not, and not the defense.[3]

Where a special statutory mode of acquiring jurisdiction is provided, that mode must be followed or the proceedings will be void.[4]

Sometimes certain jurisdictional facts must appear in order to give the court jurisdiction, as in case of the federal courts, whose jurisdiction depends upon the place of residence of the parties to the action. In such cases, the facts necessary to give the court jurisdiction must be alleged in the pleading of the party bringing the action.[5]

Jurisdiction of the person is obtained by service of process, or by voluntary appearance of the party, or by some other means authorized by law.[6]

Jurisdiction of the *res* is obtained by its seizure under process of the court,[7] or by acts which are of equivalent import, and which stand for and represent the dominion of the court over the thing, and in effect subject it to the control of the court.[8] But in order to make such juris-

[1] *Post*, sec. 22; Callen *v.* Ellison, 13 Ohio St. 446; 82 Am. Dec. 448.

[2] *Post*, secs. 22, 23, 25. [3] Wells' Jur., sec. 4.

[4] *Post*, secs. 20, 25; Clark *v.* Thompson, 47 Ill. 25; 95 Am. Dec. 457.

[5] Foster's Fed. Prac., sec. 66; Denny *v.* Pironi, 141 U. S. 121; 11 S. Ct. Rep. 966; Timmons *v.* Elyton Land Co., 139 U. S. 378; 11 S. Ct. Rep. 585.

[6] *Post*, sec. 13; Freeman on Judg., sec. 119; Callen *v.* Ellison, 13 Ohio St. 446; 82 Am. Dec. 448.

[7] *Post*, sec. 14; Freeman on Judg., sec. 119; Cooper *v.* Reynolds, 10 Wal. 308.

[8] Cooper *v.* Reynolds, 10 Wal. 317.

diction effectual, and authorize the court to proceed in the action, notice to parties interested in the property must be given as required by law.[1]

12. JURISDICTION OF THE SUBJECT-MATTER.—The subject-matter of an action is the matter in controversy between the parties, and may be real or personal property, money, or some equitable relief. It is "the cause, the object, the thing in dispute."[2]

Actions affecting title to real estate are local in their nature, and must be brought in the court having jurisdiction over the territory within which the land is situate.[3]

Courts will take judicial notice of the boundaries of a county and of the location of lands described by government subdivisions as by township, range, and section, and the legal subdivisions thereof; and if the description by such subdivisions shows the land to be within the county where the action is brought this is sufficient;[4] but the pleading should allege in terms that the land is situate in the county. The jurisdiction of the court, if one of general jurisdiction, will be presumed, however, and unless it affirmatively appears by the description that it is out of the territorial jurisdiction of the court the fact must be shown by answer.

Jurisdiction of the subject-matter can not be given or enlarged by consent of parties.[5]

It is held that "where the jurisdiction of the court as to the *subject-matter* has been limited by the constitution or the statute, the consent of parties can not confer jurisdiction. But when the limit regards *certain persons*, *they* may,

[1] *Post*, sec. 14.

[2] Bouv. Law Dic., title, Subject-matter; Callen *v.* Ellison, 13 Ohio St. 446; 82 Am. Dec. 448.

[3] Campbell *v.* West, 86 Cal. 197; 24 Pac. Rep. 1000.

[4] Campbell *v.* West, 86 Cal. 200; 24 Pac. Rep. 1000; Wilcox *v.* Moudy, 82 Ind. 219.

[5] *Ante*, sec. 11; Freeman on Judg., sec. 120; Doctor *v.* Hartman, 24 Ind. 221; Damp *v.* Town of Dane, 29 Wis. 419, 431; Dicks *v.* Hatch, 10 Ia. 380; Fleischman *v.* Walker, 91 Ill. 318; Cooley's Const. Lim., 5th ed., 495; Elliott's App. Pro., sec. 13.

if competent, waive their privilege, and this will give the court jurisdiction." [1]

The pleadings necessary to show and call for the exercise of jurisdiction by a court that would, if proper pleadings were filed, have jurisdiction of the subject-matter, may, in most of the states, be waived by consent of the parties, upon the presentation to the court of an agreed case, which takes the place of pleadings. But the statutes regulating this proceeding usually require a verified showing by the parties that the controversy between them is real, and the proceeding in good faith to determine the rights of the parties. If it appears that the purpose of such an agreed state of facts is to obtain a decision of a question not really in controversy between the parties, the court will not act. The required affidavit is necessary to give the court jurisdiction.[2] But in order to give a court jurisdiction an action must be commenced.[3] And the proceeding by way of an agreed case is no exception to the rule. The agreed statement of facts takes the place of the pleadings and process.

Whether an action for the specific performance of a contract to convey real estate is an action operating upon the real estate, or upon the person of the defendant, and whether the action is transitory or local is not clearly settled. Some of the codes provide that actions "for the recovery of real property, or of an estate or interest therein, or for the determination, in any form, of such right or interest," shall be brought in the county in which the subject-matter of the action, or some part thereof, is situated.[4] In others it is specifically provided that the action may be brought in the county where the defendants or any of them reside.[5]

[1] Gray *v.* Hawes, 8 Cal. 568.

[2] 1 Work's Ind. Prac. & Pl., sec. 249; Godfrey *v.* Wilson, 70 Ind. 58; Union Coal Co. *v.* City of La Salle, 26 N. E. Rep. 506; Town of Plainfield *v.* Village of Plainfield, 67 Wis. 525; Myers *v.* Sawyer, 99 Ind. 237; Elliott's App. Pro., sec. 223.

[3] Ex parte Cohen, 6 Cal. 320.

[4] Code Civil Pro. Cal., sec. 392; Rev. Stat. of Ind., 1881, sec. 307.

[5] Rev. Stat. Ohio, 1886, sec. 5024; An. Stat. Neb., 1881, p. 245, sec. 84.

Whether the action is one so far affecting the title to, or an estate in, lands, or for the determination in any form of any right or interest therein as to require the same to be brought in the county where the land is situated, is one about which the authorities are not agreed. But the better rule seems to be that the action falls within the last clause of the codes referred to, and is an action to determine an interest in lands.[1]

It is held by the Supreme Court of the United States that the tribunals of one state may compel the performance of contracts to convey property situate in another state.[2] And so it is held in some of the states.[3]

It has been held that when an action is tried and judgment rendered in a court not having jurisdiction, and an appeal is taken to a court having original jurisdiction of the subject-matter of the action, and the parties appear and consent to a trial there, the judgment of the latter court will be binding.[4] But this was upon the ground that the court where the cause was last tried had jurisdiction of the subject-matter, and while it could not obtain jurisdiction by virtue of the appeal from a court having no jurisdiction, the parties having appeared and consented to a trial in that court, the case must be treated as if it had been originally commenced in that court and the parties had voluntarily appeared in the action and gone to trial.[5] But in such a case a writ issued out of the court in which the case was commenced can not be amended, on appeal to another court having original jurisdiction, so as to make it a writ issuing from the latter court, and thus give such court jurisdiction.[6]

[1] 1 Work's Ind. Pr. & Pl., sec. 180; Parker *v.* McAllister, 14 Ind. 12; Vail *v.* Jones, 31 Ind. 467; Franklin *v.* Dutton, 79 Cal. 605; 21 Pac. Rep. 964; but see Coon *v.* Cook, 6 Ind. 268; Dehart *v.* Dehart, 15 Ind. 167; Morgan *v.* Bell, 28 Pac. Rep. 925.

[2] Massie *v.* Watts, 6 Cranch, 148; Watkins *v.* Holman, 16 Pet. 25; Pennoyer *v.* Neff, 95 U. S. 723; Watts *v.* Waddle, 6 Pet. 389.

[3] Seixas *v.* King, 39 La. Ann. 510; 2 So. Rep. 416; Burnley *v.* Stevenson, 24 Ohio St. 478; 15 Am. Rep. 621.

[4] Randolph County *v.* Ralls, 18 Ill. 29.

[5] See Harrington *v.* Heath, 15 Ohio St. 483.

[6] Osgood *v.* Thurston, 23 Pick. (Mass.) 110.

Personal actions are transitory, and, as a rule, must be brought in the court having jurisdiction over the territory in which the defendant resides.[1]

There are many statutory exceptions to this rule, however. For example, it is sometimes provided that foreign corporations may be sued in the courts of the plaintiff's residence.[2]

So it is sometimes provided by statute that actions upon contract may be brought in the courts of the place where the contract was entered into.[3] And, as a rule, in a case of fraud, trust, or contract, the jurisdiction of a court of equity is sustainable wherever the person is found, though the decree may affect lands without its jurisdiction.[4]

An action may be brought in a state where both the plaintiff and defendant reside, although the cause of action, as in case of a tort, arose in a foreign country.[5]

It is held in New York that the courts of that state may, in their discretion, entertain jurisdiction of an action for personal injuries between persons actually domiciled in that state when the action is brought, though the injury was committed in a foreign state, of which the parties were still citizens; but that the courts are not bound to entertain jurisdiction in such cases.[6]

Statutory provisions modifying the general rule that personal actions must be brought in the county where the defendants, or some of them, reside are most frequently directed against corporations, and particularly foreign corporations, though they are not confined to this class of cases. They are usually enacted with a view of preventing hardships resulting to injured parties from the requirement that they shall follow the defendant to the place of his residence in order to obtain their rights through

[1] Williams *v.* Welton, 28 Ohio St. 464.

[2] Flynn *v.* Central R. R. of New Jersey, 15 N. Y. Sup. 328; 20 N. Y. Civ. Proc. Rep. 179.

[3] Kenney *v.* Greer, 13 Ill. 436; 54 Am. Dec. 439.

[4] Massie *v.* Watts, 6 Cranch, 148.

[5] Tupper *v.* Morin, 12 N. Y. Sup. 310; 25 Abb. New Cases, 398.

[6] Burdick *v.* Freeman, 120 N. Y. 420; 24 N. E. Rep. 949.

the courts. These statutes are so various that it would be impossible to give, in a work of this kind, even a general synopsis of the legislation on this subject.

It is sometimes provided that where a defendant is a non-resident the plaintiff, being a resident, may choose his forum and bring the action in any county in the state.[1]

In divorce cases it is usually provided by statute that the action may be brought where either the husband or wife have their *bona fide* residence.[2]

If the court in which the action is brought has not jurisdiction of the subject-matter, an appellate court in which the case must be tried *de novo* is also without jurisdiction, although it would have had original jurisdiction of the action.[3]

13. Jurisdiction of the person.—The question as to the place where personal actions shall be commenced is considered elsewhere.[4] This section relates to the means, generally, by which jurisdiction of the person may be acquired. There is a most material difference, in this respect, between jurisdiction of the subject-matter and of the person. As has been shown, jurisdiction of the subject-matter can not be conferred upon a court by the consent of parties.[5]

It is otherwise as to jurisdiction of the person. If a court has jurisdiction of the subject-matter, a party may voluntarily submit himself to such jurisdiction, or may, by failing to object thereto at the proper time, waive his right to contest such jurisdiction.[6] And, if a court has lost juris-

[1] McCauley *v.* Murdock, 97 Ind. 229, 232.

[2] Cooley's Const. Lim., 5th ed., 495.

[3] Pritchard *v.* Bartholomew, 45 Ind. 219; Mays *v.* Dooley, 59 Ind. 287; Stringham *v.* Board of Supervisors, 24 Wis. 594. *Post*, sec. 21.

[4] *Post*, sec. 15.

[5] *Ante*, sec. 12.

[6] Freeman on Judg., sec. 119; 12 Am. & Eng. Enc. of Law, 299; Aurora Fire Ins. Co. *v.* Johnson, 46 Ind. 315, 321; Montgomery *v.* Town of Scott, 32 Wis. 252; Damp *v.* Town of Dane, 29 Wis. 419, 431; McCauley *v.* Murdock, 97 Ind. 219, 232; Kenney *v.* Greer, 13 Ill. 432, 435; 54 Am.

diction of the person, it may be restored in the same way.[1]

Consent is given by a general appearance, in person or by attorney, entered in the action, or by some act equivalent thereto, such as the filing of a pleading in the case or some similar act recognizing the authority of the court to proceed in the action.[2] But, unless it is expressly provided to the contrary, as it is in some of the states, a special appearance may be entered for the purpose of questioning whether the court has acquired jurisdiction, by the service of process, as required by law, without giving the court jurisdiction to proceed further than to determine whether it has acquired jurisdiction or not.[3]

The appearance to be special must be on jurisdictional grounds. If upon any other ground it is a general appearance and gives the court jurisdiction.[4]

In Iowa a party appearing to object to the jurisdiction of the court can not afterward object to the sufficiency of the service of notice.[5] So under a statute of Texas it is held that if the citation or service is quashed on motion of the defendant, he shall be deemed to have entered his appearance to the action.[6]

Dec. 439; Brown *v.* Webber, 6 Cush. (Mass.) 560; McCormick *v.* Penn. Cent. etc., R. R., 49 N. Y. 303. *Post*, sec. 22.

[1] 12 Am. & Eng. Enc. of Law, 299; Taylor *v.* Atlantic & Pac. R. R. Co., 68 Mo. 397.

[2] Aurora Fire Ins. Co. *v.* Johnson, 46 Ind. 315, 321; Carpenter *v.* Shepardson, 43 Wis. 406, 412; Damp *v.* Town of Dane, 29 Wis. 419, 431; Smith *v.* Curtis, 7 Cal. 584; McCormick *v.* Penn. Cent, R. R. Co., 49 N. Y. 303; Wasson *v.* Cone, 86 Ill. 46; Fee *v.* Big Sand Iron Co., 13 Ohio St. 563; Slauter *v.* Hallowell, 90 Ind. 286; Roy *v.* Union Mercantile Co., 26 Pac. Rep. 996.

[3] Branner *v.* Chapman, 11 Kan. 118; New Albany, etc., R. R. Co. *v.* Combs, 13 Ind. 490; Linden Gravel M. Co. *v.* Sheplar, 53 Cal. 245; Southern Pac. R. R. Co. *v.* Superior Court Kern Co., 59 Cal. 471; Green *v.* Green, 42 Kan. 654; 22 Pac. Rep. 730; Nelson *v.* Campbell, 1 Wash. St. 261; 24 Pac. Rep. 539; Murphy *v.* Ames, 1 Mon. 276. *Post*, sec. 22.

[4] Green *v.* Green, 42 Kan. 654; 22 Pac. Rep. 730; Burdette *v.* Corgan, 26 Kan. 102; Grantier *v.* Rosecrance, 27 Wis. 491: Roy *v.* Union Mercantile Co., 26 Pac. Rep. 996; Alderson *v.* White, 32 Wis. 308.

[5] Church *v.* Crossman, 49 Ia. 444.

[6] Rabb *v.* Rogers, 67 Tex. 335; 3 S. W. Rep. 303; Central & M. R. Co. *v.* Morris, 68 Tex. 49; 3 S. W. Rep. 457.

In England a special mode of appearance by delivering to the proper officer a memorandum in writing is provided for.[1] An appearance may be entered by attorney. But the effect of an appearance by an unauthorized attorney depends upon the place of residence of the party, and whether the court is one of general or inferior or special jurisdiction. The weight of authority is to the effect that the want of authority of an attorney to appear can not be shown in a collateral proceeding to defeat a judgment founded on such appearance except upon the ground of fraud.[2] Nor can such authority be questioned, after judgment, in a direct proceeding, where the judgment is one of a court of superior jurisdiction, and the party is a resident of the state, except upon a showing that he has a good defense, and then, in order to obtain relief, he must come in and submit himself to the jurisdiction, and all proceedings in his favor are subject to the intervening rights of third parties. In this class of cases the party is simply permitted to come in and have the case opened up and to make his defense. But where the defendant is a non-resident of the state in which the judgment is rendered, and has had no notice of the pendency of the action, and has not been within the jurisdiction of the court during the pendency of the action, he is entitled to have the judgment set aside, absolutely, upon a showing that the appearance of the attorney was unauthorized.[3]

[1] Wilson's Jud. Acts, order 12, sec. 8, p. 204; Foulke's Ac. in Sup. Ct. 63.

[2] *Post*, sec. 23; Baggott *v.* Mullen, 32 Ind. 332.

[3] 1 Work's Ind. Prac. and Pl., secs. 227, 228, 230; Wiley *v.* Pratt, 23 Ind. 633; Brown *v.* Nichols, 42 N. Y. 30; Denton *v.* Noyes, 6 Johns. 298; 5 Am. Dec. 237, 244; Sterne *v.* Bentley, 3 How. Pr. 331; Critchfield *v.* Porter, 3 Ohio, 519; Coon *v.* Welborn, 83 Ind. 230; Bush *v.* Bush, 46 Ind. 70; Cleveland *v.* Hopkins, 55 Wis. 387; 13 N. W. Rep. 225; Graham *v.* Spencer, 14 Fed. Rep. 605; Bagott *v.* Mullen, 32 Ind. 332.

In Wiley *v.* Pratt, the rule is thus stated: "Where a judgment is recovered in a court of general jurisdiction against a defendant, and the record shows that an attorney of the court appeared for the defendant and filed an answer, the jurisdiction of the court can not be controverted, unless it be by proof of fraud, which we are not in this case required to decide, or that the defendant was not a citizen of the state,

The authorities are not in entire accord on this question, some of them going to the extent of holding that as a matter of policy a judgment rendered upon the appearance of an attorney must be held conclusive.

If rights of innocent third parties have intervened, or for any other reason the party is held to be bound by the judgment, his remedy is against the attorney who appeared for him without authority.[1]

There is still another line of decisions going to the other extreme and holding that a judgment rendered upon the unauthorized appearance of an attorney, where the party has had no notice of the pendency of the action, is void

nor during the pendency of the proceedings within the jurisdiction of the court in which the judgment was rendered, and had neither been notified of the pendency of the suit, nor had given authority to the attorney to enter an appearance for him. . . . While, however, a party is permitted to controvert the authority of the attorney to appear for him when he was without the jurisdiction of the court rendering the judgment, and upon establishing the fact that the appearance was unauthorized is relieved from the enforcement of the judgment, this relief will not be granted where the defendant was within the jurisdiction of the court, and an unauthorized appearance has been entered for him by counsel, unless he can establish a defense on the merits to the cause of action in which the judgment was rendered."

And in Work's Ind. Practice & Pleading, the effect of the rule is said to be "that where the defendant is not within the jurisdiction of the court, and has had no notice of the pendency of the action, the appearance of an attorney, without authority, does not waive the failure to issue and serve the summons, or make publication. He may, in such case, set aside the appearance so entered, without submitting to the jurisdiction of the court. But where the defendant resides within the jurisdiction of the court, or has actual notice of the pendency of the action, an appearance by an attorney who has no authority to appear, is so far binding upon him as to waive any defect in the process or its service. He may, by showing the want of authority of the attorney to appear, and that he has a good and meritorious defense to the action, have leave to prove such defense, and if the defense is established, the judgment will be changed or modified accordingly, but by the very act of applying for such relief, he submits himself to the jurisdiction of the court, and waives the service of process, if this has not already been done by the appearance of the attorney, so that the effect upon his rights, so far as the service of process is concerned, would be the same in either case." 1 Work's Ind. Prac. & Pl., sec. 230.

[1] Coon *v.* Welborn, 83 Ind. 232; Brown *v.* Nichols, 42 N. Y. 30.

for want of jurisdiction, and that innocent parties will not be protected.[1]

In others it is held that, in case of a direct attack upon the jurisdiction of the court, as by motion in the same court to vacate the judgment, the want of authority on the part of the attorney may be shown by extrinsic evidence; and upon the fact being established the judgment will be declared void and set aside absolutely.[2] But it is believed that the rule laid down above is the better rule, and the one sustained by the weight of authority.[3]

No doubt the great weight of modern authority is in favor of the right of the defendant to be relieved from the

[1] Stocking *v.* Hanson, 35 Minn. 207; 28 N. W. Rep. 507; Reynolds *v.* Fleming, 30 Kan. 106; 1 Pac. Rep. 61; Anderson *v.* Hawne, 115 Ill. 33; 3 N. E. Rep. 566; Citizens' Bank *v.* Brooks, 23 Fed. Rep. 21; Kepley *v.* Irwin, 14 Neb. 300; 15 N. W. Rep. 719; McDowell *v.* Gregory, 14 Neb. 33; 14 N. W. Rep. 899; Williams *v.* Neth, 31 N. W. Rep. 630; Great West Mining Co. *v.* Woodmas, 12 Col. 46; 20 Pac. Rep. 774.

[2] Reynolds *v.* Fleming, 30 Kan. 106; 1 Pac. Rep. 61.

[3] In Mutual Life Ins. Co. *v.* Pinner, 43 N. J. Eq. 52; 10 Atl. Rep. 186, the court said: "The defendant having shown by satisfactory proof that his appearance was entered without his authority, and having promptly asked for relief, has a right, according to the modern rule, to be relieved against the consequences of the appearance. The ancient rule was otherwise. It was formerly held that a defendant was concluded by an appearance entered for him without his authority, and that the only redress he could obtain for such wrong was by an action against the person who had fraudulently assumed to act for him. Gifford *v.* Thorn, 9 N. J. Eq. 702; Price *v.* Ward, 25 N. J. Law, 225. The injustice of this rule is manifest. It compelled the defendant to stand bound by the unauthorized act of a mere intermeddler, and held him concluded by a judicial sentence which he had never had an opportunity to contest. The modern rule is firmly settled the other way, and may be stated thus: The entry of an appearance for a defendant carries with it a presumption that it was entered by authority. If the contrary be alleged, affirmative proof must be produced, and, until it is, the appearance will be held to be valid; but on its being satisfactorily proved, promptly after the discovery of the fact, that it was entered without authority, the defendant will be relieved from its consequences. McKelway *v.* Jones, 17 N. J. Law, 345; Gifford *v.* Thorn, *supra;* Hess *v.* Cole, 23 N. J. Law, 116; Price *v.* Ward, *supra;* Dey *v.* Hathaway Printing and Telephone Co., 41 N. J. Eq. 419; 4 Atl. Rep. 675. The defendant is entitled to an order declaring that his appearance was entered without authority, and that it is, in consequence, void and of no effect."

effects of a judgment rendered against him upon an unauthorized appearance, but not that such a judgment is absolutely void. The conflict of the authorities is as to the effect of setting aside the judgment. In most of the cases holding that such a judgment is void, the question was raised upon a direct proceeding to be relieved from the judgment, and a holding that the judgment was void was unnecessary to a decision of the cases, but some of them were not.

The presumption is always that the appearance was authorized, and the burden of showing that it was unauthorized rests upon the party seeking relief.[1] But the record showing an appearance is not conclusive against him that the appearance was his appearance or authorized by him.[2] A distinction is made between foreign and domestic judgments as to the effect of the recitals in the record.[3]

Where an attachment proceeding in a United States court is invalid because the defendant is not found in the district, a subsequent appearance by the defendant, although it gives the court jurisdiction to proceed to judgment, has been held not to render the attachment proceedings valid.[4] And it may be stated as a general rule that where certain steps, provided by statute, must be taken in order to obtain jurisdiction of the proceeding, a voluntary appearance by the defendant, and a submission of his person to the jurisdiction of the court, will not give jurisdiction of such proceeding.[5]

There are two kinds of service, actual and constructive, the first being a notice served personally upon the defendant, and denominated personal service, the other being by publication in a newspaper, or in some other way provided by law.[6]

An acknowledgment of service may be made in lieu of

[1] Reynolds *v.* Fleming, 30 Kan. 106; 1 Pac. Rep. 64; Citizens' Bank *v.* Brooks, 23 Fed. Rep. 21; Wheeler *v.* Cox, 56 Ia. 36; 8 N. W. Rep. 688.

[2] Citizens' Bank *v.* Brooks, 21 Fed. Rep. 21.

[3] *Post*, sec. 22; Harshey *v.* Blackmarr, 20 Ia. 161; 89 Am. Dec. 520.

[4] Noyes *v.* Canada, 30 Fed. Rep. 665.

[5] Steen *v.* Norton, 45 Wis. 412.

[6] Hahn *v.* Kelly, 34 Cal. 391, 403; 94 Am. Dec. 742.

actual service, but statutory provisions authorizing such acknowledgment usually require that it shall be indorsed on the summons.[1]

Jurisdiction authorizing a personal judgment can only be acquired by personal service, acknowledgment of service in the manner provided by law, or the appearance of the defendant; and such service must be made within the state or territory where the action is brought.[2]

Provision is sometimes made for personal service of a summons out of the state, but such service is treated as constructive service by publication, and does not give the court jurisdiction to render a personal judgment.[3]

Where jurisdiction is obtained by publication, or constructive service in any other way, the pleadings of the plaintiff can not be amended after publication so as to allege a different cause of action. The court only acquires jurisdiction of the cause of action alleged in the complaint at the time publication is made.[4]

Service by publication, or personal service of a nonresident out of the state, can only be had as the foundation of a judgment or decree *in rem.*, where the defendant has property within the jurisdiction of the court, or in cases affecting the *status* of the parties, as for example, in actions for divorce.[5] And in divorce cases such notice gives the court no jurisdiction to render a judgment for the payment of money.[6]

[1] Wood *v.* Pond, 21 Ohio St. 150.

[2] Wood *v.* Pond, 21 Ohio St. 150; Stuart *v.* Anderson, 70 Tex. 588; 8 S. W. Rep. 295, 298; Pennoyer *v.* Neff, 95 U. S. 714; Scott *v.* Noble, 72 Pa. St. 119; 13 Am. Rep. 663; Galpin *v.* Page, 18 Wall. 367; Lutz *v.* Kelly, 47 Ia. 307; Schwinger *v.* Hickok, 53 N. Y. 280.

[3] 2 Bates' Pl. Par. & Forms, 990; Wood *v.* Pond, 21 Ohio St. 148; Williams *v.* Welton, 28 Ohio St. 467; Allen *v.* Cox, 11 Ind. 383; Brooklyn Trust Co. *v.* Bulmer, 49 N. Y. 84.

[4] Stuart *v.* Anderson, 70 Tex. 588; 8 S. W. Rep. 295; McMinn *v.* Whelan, 27 Cal. 300, 313; Pennoyer *v.* Neff, 95 U. S. 714.

[5] Williams *v.* Welton, 28 Ohio St. 451, 467; Wood *v.* Stanberry, 21 Ohio St. 148; Pennoyer *v.* Neff, 95 U. S. 714; Galpin *v.* Page, 18 Wall. 369; Hunt *v.* Hunt, 72 N. Y. 237; 28 Am. Rep. 129; Cooley's Const. Lim., 5th ed., 404; Cooper *v.* Reynolds, 10 Wall. 319.

[6] Cooley's Const. Lim., 5th ed., 501.

In many of the states provision has been made that foreign corporations doing business therein shall designate some one upon whom service can be made, and that summons shall be served upon such person so designated, or that service may be made on certain of their agents. These statutes have been upheld, and it is held that such service is sufficient to give the court jurisdiction to render a personal judgment against the corporation.[1]

In some of the states provision is made for the service of summons by leaving a copy thereof at the usual place of residence of the defendant. This, if made within the state, is personal service.[2]

It is not necessary that the defendant reside within the the state in which the court has jurisdiction. If he is a citizen of another state, but voluntarily comes into the state where the action is brought, temporarily, and is personally served with process, the service is good, and he is bound by the judgment.[3] Nor does the fact that the plaintiff is a non-resident affect his right to maintain the action.[4]

There can be no appearance for a minor. In order to give jurisdiction of his person, service must be made as provided by law.[5]

Where service by publication is authorized, a strict compliance with the law providing therefor is required.[6] This is placed upon the ground that the proceeding is in derogation of the common law.[7] But the common-law

[1] Gibbs *v.* Queen Ins. Co., 63 N. Y. 114, 124; 20 Am. Rep. 513; State *v.* U. S. Mut. Ac. Ass'n, 67 Wis. 624; Lafayette Ins. Co. *v.* French, 18 How. 404; L. R. 9 Exch. 345; 10 Moak's Eng. Rep. 492; Knapp *v.* National Mut. F. Ins. Co., 30 Fed. Rep. 607.

[2] Thomas *v.* Richards, 69 Wis. 671; Dunkle *v.* Elston, 71 Ind. 585.

[3] Rape *v.* Heaton, 9 Wis. 328, 343; 76 Am. Dec. 269; Peabody *v.* Hamilton, 106 Mass. 220; Mowry *v.* Chase, 100 Mass. 85.

[4] Peabody *v.* Hamilton, 106 Mass. 220; Mowry *v.* Chase, 100 Mass. 85.

[5] Carver *v.* Carver, 64 Ind. 194; Helmes *v.* Chadbourne, 45 Wis. 60; Roy *v.* Rowe, 90 Ind. 54.

[6] Jordan *v.* Giblin, 12 Cal. 100; Ricketson *v.* Richardson, 26 Id. 149; McMinn *v.* Whelan, 27 Id. 300; Galpin *v.* Page. 18 Wall. 369.

[7] Ricketson *v.* Richardson, 26 Cal. 149.

rule that statutes in derogation thereof shall be strictly construed has been abrogated by the codes of many of the states.[1]

At common law constructive service was unknown. It is a creature of statute. It has, however, become almost, if not quite, universal in all of the states, but the statutes differ materially as to the steps necessary to procure an order for publication and the manner in which it shall be made. This subject is somewhat more fully considered in another place.[2]

In England it is provided by the rules of court that the court or judge may make such order for service by advertisement or otherwise, as may be just.[3] The application for such an order must be supported by an affidavit setting forth the grounds upon which the application is made.[4] And such a showing is usually required in this country.

14. Jurisdiction in rem.—The great and important distinction between actions *in personam* and proceedings *in rem*, in respect to the question of jurisdiction, consists in the different means of acquiring such jurisdiction in the two classes of cases. In an action to recover a personal judgment against a defendant, personal or actual, service of notice upon him is absolutely necessary to give the court jurisdiction.[5]

In proceedings *in rem* this is not necessary. Jurisdiction of the property is acquired by a seizure of, or levy upon, the same under some appropriate writ issuing out of the court having jurisdiction over such property; or arises from some contract lien existing against the property and

[1] Stimson's Am. Stat. Law, sec. 1021. [2] *Post*, sec. 38.

[3] "When service is required, the writ shall, wherever it is practicable, be served in the manner in which personal service is now made, but, if it be made to appear to the court or a judge that the plaintiff is from any cause unable to effect prompt personal service, the court or judge may make such order for substituted or other service, or for the substitution for service of notice, by advertisement, or otherwise, as may be just." Wilson's Jud. Acts, 192, sec. 2.

[4] Wilson's Jud. Acts, 198, Order X. [5] *Ante*, sec. 13.

which is sought to be enforced.[1] But such acquisition of jurisdiction, in order to be effectual, must be followed by notice, in some form, to the party whose rights are to be cut off or affected by a decree against the property.[2] Such notice, either personal or constructive, is as necessary to the binding effect of a decree *in rem*, if directly attacked, as personal notice is in case of an action against the person.[3] And by statute in some of the states service of notice on the party owning or interested in the property, is sufficient to give jurisdiction without a seizure of the property.[4]

A failure to give notice does not deprive the court of jurisdiction or render the judgment void. Therefore, the objection that the affidavit for publication or the publication is defective, or even that no notice was given, can only be taken advantage of by appeal.[5]

This can not be so, however, where the jurisdiction of the court is sought to enforce a lien upon property, the property not being seized or levied upon.

In some cases it is held that, in attachment proceedings, seizure of the property is not necessary to give jurisdiction, that if the defendant has property in the state that fact, and not its seizure, gives jurisdiction.[6] But this is at least a doubtful proposition. In such cases the court, without the issuance of the writ, would certainly have no jurisdiction to proceed, as it is through the writ of attachment alone that jurisdiction is obtained. It would seem, therefore, that the levy of the writ, which alone creates the lien upon which the judgment of the court can rest,

[1] *Ante*, sec. 12.

[2] Waldron *v.* Chicago & N. W. R. Co., 1 Dak. 351; 46 N. W. Rep. 456, 459.

[3] Waples' Pro. in Rem., sec. 626; Stuart *v.* Anderson, 70 Tex. 588; 8 S. W. Rep. 295; Lutz *v.* Kelly, 47 Ia. 309; Pennoyer *v.* Neff, 95 U. S. 714.

[4] Averill *v.* Steamer Hartford, 2 Cal. 308.

[5] Lessee of Paine *v.* Mooreland, 15 Ohio, 436; Drake on Attach., sec. 437; Cooper *v.* Reynolds, 10 Wall. 319; Williams *v.* Stuart, 3 Wis. 773.

[6] Jarvis *v.* Barrett, 14 Wis. 591; Force *v.* Gower, 23 How. Prac. 294; Fiske *v.* Anderson, 33 Barb. 71.

is necessary to give the court jurisdiction. There are many cases, however, in which no seizure of the property is necessary. If the action is to enforce a lien upon the property created by the contract, as, for example, a suit to foreclose a mortgage, seizure of the property is not necessary. The fact that the property is within the state is the essential fact upon which jurisdiction depends in that class of cases. But in such cases notice in some form is necessary to give jurisdiction.

The doctrine that the seizure of the property under a writ of attachment is not necessary to give jurisdiction, seems to be placed upon the ground that the writ is merely a provisional remedy incidental to the action to recover the debt. But it must be borne in mind that where the defendant is a non-resident it is the provisional remedy alone that can be enforced. No matter how much property the defendant may own within the jurisdiction of the court, any judgment it may render must be confined to the property attached. It is the property *seized* or levied upon over which the court obtains jurisdiction, and not the whole property of the defendant within the state.[1]

[1] Cooper *v.* Reynolds, 10 Wall. 308; Pennoyer *v.* Neff, 95 U. S. 723; Drake on Attach., secs. 5, 449; Lessee of Paine *v.* Mooreland, 15 Ohio, 443; McKinney *v.* Collins, 88 N. Y. 216.

The case of Cooper *v.* Reynolds is a leading case on this subject. In that case the court said: "Now, in this class of cases, on what does the jurisdiction of the court depend? It seems to us that the *seizure of the property*, or that which, in this case, is the same in effect, the levy of the writ of attachment on it, *is the one essential requisite to jurisdiction*, as it unquestionably is in proceedings purely *in rem*." And again: "So, also, while the general rule in regard to jurisdiction *in rem* requires the actual seizure and possession of the *res* by the officer of the court, such jurisdiction may be acquired by acts which are of equivalent import, and which stand for and represent the dominion of the court over the thing, and in effect subject it to the control of the court. Among this latter class is the levy of a writ of attachment or seizure of real estate, which being incapable of removal, and lying within the territorial jurisdiction of the court, is for all practical purposes brought under the jurisdiction of the court by the officer's levy of the writ and return of that fact to the court. So the writ of garnishment, or attachment, or other form of service, on a party holding a fund which becomes the subject of litigation, brings that fund under the jurisdiction of the court.

It is sometimes said, in the decided cases, that proceedings in attachment are not proceedings *in rem*, but they are essentially so where there is no personal service on the defendant; as in that case the proceeding is entirely against the property, and any judgment rendered must be confined to it.

As it is necessary to the jurisdiction of the court that it obtain the custody or control of the property, so it is necessary that it shall not, at any time, lose such custody or control. If it does, its jurisdiction ceases from that moment.[1]

By this is not meant that the actual custody of the property shall be maintained. It may be released by giving bond, or in some other way provided by law, which does not affect the plaintiff's claim of right to resort to it for his debt. The bond given takes the place of the property, and the jurisdiction over the property is not affected.

It is held that it is not the affidavit alleging that the defendant has property in the state that gives jurisdiction, and that the property must, in fact, be within the jurisdiction of the court, and, therefore, the fact alleged in the affidavit may be disproved and the jurisdiction thereby defeated.[2] But if it is the levy of the writ that gives jurisdiction, no such question of fact could arise except where a question should arise as to the ownership of property levied upon.

If the defendant is personally served within the state,

though the money may remain in the actual custody of one not an officer of the court." Cooper *v.* Reynolds, 10 Wall. 317, 319.

"What, then, gives the court jurisdiction in a proceeding in attachment? The filing of the proper affidavit, issuing the writ, *and attaching the property*. The moment the writ goes into the hands of the officer, he is authorized, and required, to seize the property. When this is done the property is taken out of the possession of the debtor into the custody of the law." Lessee of Paine *v.* Mooreland, 15 Ohio, 443, n.

[1] Waples' Attach. 312.

[2] Fiske *v.* Anderson, 33 Barb. (N. Y.) 71.

This case of Fiske *v.* Anderson, and Force *v.* Gower, 23 How. Prac. 294, are practically overruled by the later case of McKinney *v.* Collins, 88 N. Y. 216.

although a non-resident, and only temporarily, or transiently, therein, this gives the court full jurisdiction.[1]

Neither the seizure of the property, nor notice to the owners, is alone sufficient to authorize a judgment affecting the property or the interest of the parties therein. Seizure of the property is necessary to give jurisdiction over it, and notice to the parties interested is necessary to authorize a decree affecting such interests.[2]

Where the action is for the recovery of a debt the jurisdiction of the court over the property thus brought under its control is limited. The court simply acquires the right to apply the property to the satisfaction of any amount that may be found to be due the plaintiff.[3]

[1] *Ante*, sec. 13; Peabody *v.* Hamilton, 106 Mass. 220.

[2] Lutz *v.* Kelly, 47 Ia. 309; Drake on Attach., secs. 436, 437; Darrance *v.* Preston, 18 Ia. 396.

[3] Lutz *v.* Kelly, 47 Ia. 319; Pennoyer *v.* Neff, 95 U. S. 714, 723; Darrance *v.* Preston, 18 Ia. 399.

"Such a service simply authorizes the court to conclude the rights and interests of a non-resident in property over which the court, by process of attachment, or otherwise, has acquired jurisdiction *in rem*, and to subject such property to sale in satisfaction of an amount found due. It follows that the judgment in question, considered as a mere personal judgment, is a nullity, and that the sale of real estate thereunder was unauthorized and illegal." Lutz *v.* Kelly, 47 Ia. 310.

"Our statute provides for the service of an original notice (process) outside of the state (revision, section 2815, subdivision 4, and section 2835) as well as upon non-residents by publication. (Revision, section 2831 to section 2834.) But it is clear upon principle, as has been recognized and determined by this court, that such service, by publication, or by personal service without the state, upon a person who is not a resident or citizen of this state, confers no jurisdiction either as to the person or the property of such non-resident. Story on Conflict of Laws, sec. 539; Weil *v.* Lowenthal, 10 Ia. 575." Darrance *v.* Preston, 18 Ia. 399.

A very accurate statement of the law affecting this question will be found in Cooper *v.* Reynolds, 10 Wall. 317, where the court, speaking through Mr. Justice Miller, said: "Its essential purpose or nature is to establish, by the judgment of the court, a demand or claim against the defendant, and to subject his property, lying within the territorial jurisdiction of the court, to the payment of that demand. But the plaintiff is met, at the commencement of his proceedings, by the fact that the defendant is not within that territorial jurisdiction, and can not be served with any process by which he can be brought, personally, within the power of the court. For this difficulty the statute has provided a

And where the complaint, or petition, is so amended as to set up a new cause of action, a new notice must be given, or a decree rendered upon such amended pleading will be void for want of jurisdiction.[1]

Only the rights of such persons as are notified of the proceeding, in the manner provided by law, will be affected by the decree.[2]

If the proceeding is against the interest of certain per-

remedy. It says that, upon affidavit being made of that fact, a writ of attachment may be issued and levied on any of the defendant's property, and a publication may be made warning him to appear; and that, thereafter, the court may proceed in the case whether he appears or not. If the defendant appears the cause becomes, mainly, a suit *in personam*, with the added incident, that the property attached remains liable, under the control of the court, to answer to any demand which may be established against the defendant by the final judgment of the court. But if there is no appearance of the defendant, and no service of process on him, the case becomes, in its essential nature, a proceeding *in rem*, the only effect of which is to subject the property attached to the payment of the demand which the court may find to be due to the plaintiff. That such is the nature of this proceeding in this latter class of cases is clearly evinced by two well established propositions: *First*, The judgment of the court, though in form a personal judgment against the defendant, has no effect beyond the property attached in that suit. No general execution can be issued for any balance unpaid after the attached property is exhausted. No suit can be maintained on such a judgment, in the same court or in any other, nor can it be used as evidence in any other proceeding not affecting the attached property, nor could the costs in that proceeding be collected of defendants out of any other property than that attached in the suit. *Second*, The court, in such a suit, can not proceed unless the officer finds some property of defendant on which to levy the writ of attachment. A return that none can be found is the end of the case, and deprives the court of further jurisdiction, though the publication may have been duly made and proven in court. Now, in this class of cases, on what does the jurisdiction of the court depend? It seems to us that the seizure of the property, or that which, in this case, is the same in effect, the levy of the writ of attachment on it, is the one essential requisite to jurisdiction, as it unquestionably is in proceedings purely *in rem*. Without this the court can proceed no further; with it the court can proceed to subject that property to the demand of plaintiff." Cooper *v.* Reynolds, 10 Wall. 317; Pennoyer *v.* Neff, 95 U. S. 723; Rowley *v.* Berrian, 12 Ill. 199.

[1] *Ante*, sec, 13; Stuart *v.* Anderson, 70 Tex. 588; 8 S. W. Rep. 295.

[2] Waples' Pro. in Rem., sec. 626.

sons, and the object is to reach that interest alone, the notice should be directed to such persons. But the proceeding may be purely against the thing, in which case it is sometimes said that the proceeding is against all the world, and the notice must necessarily be general. All the world being parties, the notice must be to all the world.[1] Under such a notice any and all persons who claim any interest in the property are called upon to assert such claims; and if they do not, their interests are cut off or made subservient to the decree rendered.[2]

If the notice is limited to certain persons, made parties to the action, the decree rendered is binding upon the rights of such parties only.[3]

The fact that the process of a court can not run beyond the territory over which it has jurisdiction, has given rise to the necessity for the substitution of some notice, other than personal notice, on the party, either where the proceeding is strictly against the property, without making any person a party, or where the persons made parties are out of the jurisdiction of the court, and can not, for that reason, be served with personal notice. The notice thus substituted is different in the different states, but usually notice by publication, in some form, is provided for. In some states provision for personal service outside of the state is made, which is the same, in legal effect, as notice by publication. They are both constructive, and not personal or actual notice.[4]

At common law, and in common law actions, these provisional remedies by which the property of defendants, not personally served, can be reached and applied to the payment of their debts, were unknown. It was, and is, one of the distinguishing features of the common law that no judgment affecting the personal or property rights of a defendant can be rendered except upon personal service. And originally no judgment could be taken, except upon

[1] Waples' Pro. in Rem., sec. 628; Waples' Attach. 314; Cooley's Const. Lim., 5th ed., 497.

[2] Waples' Pro. in Rem., secs. 628–630. [3] Id. [4] *Ante*, sec. 13.

the actual appearance of the defendant in court. If he failed to appear, after being served, the plaintiff's only remedy, where the defendant resided out of the jurisdiction, and had property in it, was to have him proclaimed an outlaw, and thus obtain a part of his property forfeited.[1]

By the common law procedure act of England of 1852, it was provided that upon a proper showing the court or judge might, by order, give the plaintiff leave to proceed without service.[2] And the present judicature acts provide for substituted service.[3]

In this country, the law regulating the manner of service has, at the present day, become almost if not entirely statutory. Therefore, in attempting to ascertain what notice is sufficient in any case, one must look to the statute of the state in which the question arises. It is not within the scope of this work to attempt to distinguish between these different statutory provisions, or to call attention to any of them, but to deal with general principles applicable to all of them. It will be found, however, that there is but little difference in principle between the statutory provisions of different states. They differ in details and not in substance. And it will be observed that the lines that divide actions at law and suits or proceedings in equity with reference to this question are maintained, to a great extent, by statutes relating to the subject.

It is generally held that statutes authorizing notice, other than by personal service, must be strictly pursued in order to give jurisdiction, because the mode provided for is not according to the course of the common law.[4]

15. Territorial Jurisdiction. No state or country can exercise direct jurisdiction or authority over persons or

[1] Foulke's Ac. in the Sup. Ct. 59.

[2] Day's Com. Law Prac. 40, sec. 17.

[3] Wilson's Jud. Acts, pp. 192, 198, 559.

[4] Jordan *v.* Giblin, 12 Cal. 100; Ricketson *v.* Richardson, 26 Cal. 153; Freeman on Judg., sec. 127. See *post*, sec. 25.

property without its territory.[1] And the same rule is applicable to smaller subdivisions of government, districts, counties, townships, or cities, and the attempt, on the part of a court, to extend its process beyond the territory over which it has jurisdiction, is the same whether the territory be a state or a county.[2] But every state has authority to prescribe the means by which its own citizens shall be made subject to the jurisdiction of its own courts. And it may, and frequently the states do, provide that the process of courts whose jurisdiction over the subject-

[1] Story's Conflict of Laws, sec. 20; Pennoyer *v.* Neff, 95 U. S. 722; People *v.* Col. Cent. R. R. Co., 42 Fed. Rep. 638; Bartlett *v.* Knight, 2 Am. Dec. 45, note; Weil *v.* Lowenthal, 10 Ia. 575.

[2] Galpin *v.* Page, 18 Wall. 367; Phillips *v.* Thrall, 26 Kan. 780.

In Galpin *v.* Page, the Supreme Court of the United States said: "The tribunals of one state have no jurisdiction over the persons of other states unless found within their territorial limits; they can not extend their process into other states, and any attempt of the kind would be treated in every other forum as an act of usurpation without any binding efficacy. 'The authority of every judicial tribunal and the obligation to obey it,' says Burge in his Commentaries, 'are circumscribed by the limits of the territory in which it is established.' 'No sovereignty,' says Story in his Conflict of Laws, 'can extend its process beyond its own territorial limits, to subject either persons or property to its judicial decisions. Every exertion of authority of this sort beyond this limit is a mere nullity and incapable of binding such persons or property in any other tribunals.' Section 539. And in Picquet *v.* Swan, 5 Mass. 40, the same learned justice says: 'The courts of a state, however general may be their jurisdiction, are necessarily confined to the territorial limits of the state. Their process can not be executed beyond those limits; and any attempt to act upon persons or things beyond them would be deemed a usurpation of foreign sovereignty, not justified or acknowledged by the law of nations. Even the court of King's Bench, in England, though a court of general jurisdiction, never imagined that it could serve process in Scotland, Ireland, or the colonies, to compel an appearance, or justify a judgment against persons residing therein at the time of the commencement of the suit. This results from the general principle that a court created within and for a particular territory is bounded in the exercise of its powers by the limits of such territory. It matters not whether it be a kingdom, a state, a county, or a city, or other local district. If it be the former, it is necessarily bounded and limited by the sovereignty of the government itself, which can not be extra-territorial. If the latter, then the judicial interpretation is that the sovereign has chosen to assign this special limit, short of his general authority.'"

matter is confined to a county, or other limited territory within the state, shall extend throughout the state. But no state can, by law or otherwise, give its courts power or authority to extend its process into any other state or country, even as against its own citizens, for any purpose, without the consent of such state or country.[1] Such consent is sometimes given, so far as it affects the citizens of the country claiming such privilege, as a matter of comity, but it can not be demanded as even a moral obligation.[2]

The question whether the courts of one state can entertain jurisdiction of an action to compel the specific performance of a contract to convey real estate situated in another state where it has jurisdiction of the person of the defendant, is not free from doubt. Under the peculiar language of the statutes of some of the states, it has been held that the action is so far an action to determine an interest in land as to render it local and triable where the land is situated.[3]

But, independent of these statutory provisions, the weight of authority seems to be that the action is one upon contract, affecting the person, and therefore follows the person of the defendant and may be maintained by the courts of a state having jurisdiction of the person of the defendant, although the land is situated in another state.[4] But whether the court can go further and enforce a conveyance is still more doubtful. To allow such a power is to concede to the courts of one state the jurisdiction to render a decree, and enforce a conveyance, which would pass title to real estate outside of its territorial jurisdiction. And yet some of the cases go to that extent.[5]

[1] Lutz *v.* Kelly, 47 Ia. 309. [2] Story's Con. of Laws, sec. 21 *et seq.*

[3] *Ante*, sec. 12; 1 Work's Ind. Prac. & Pl., sec. 180; Parker *v.* McAlister, 14 Ind. 12; Vail *v.* Jones, 31 Ind. 467; Franklin *v.* Dutton, 79 Cal. 605.

[4] *Ante*, sec. 12; Massie *v.* Watts, 6 Cranch, 148; Watkins *v.* Holman, 16 Pet. 25; Pennoyer *v.* Neff, 95 U. S. 723; Burnley *v.* Stevenson, 24 Ohio St. 477; 15 Am. Rep. 621.

[5] Muller *v.* Dows, 94 U. S. 449; Seixas *v.* King, 39 La. Ann. 510; 2 Sou. Rep. 416.

The case of Muller *v.* Dows, was an action to foreclose a mortgage

In most of the states provision is made for jurisdiction relating to lands situate partly in different counties by giving jurisdiction to the courts in which any part of the

given by a railroad company upon its line of railroad, a part of which was within the state over which the court had jurisdiction, but a part of the line extended into another state. The mortgage covered the entire line. It was held that the court had jurisdiction to foreclose the mortgage as to the entire line, and to order the sale of the property as an entirety. But in passing upon this question the court said: "Without reference to the English chancery decisions, where this objection to the decree would be quite untenable, we think the power of courts of chancery in this country is sufficient to authorize such a decree as was here made. It is here, undoubtedly, a recognized doctrine that a court of equity sitting in a state, and having jurisdiction of the person, may decree a conveyance by him of land in another state, and may *enforce the decree by process against the defendant.* True, it can not send its process into that other state, nor can it deliver possession of land in another jurisdiction, *but it can command and enforce a transfer of the title.* And there seems to be no reason why it can not, in a proper case, effect the transfer by the agency of the trustees when they are complainants."

With respect to so much of this opinion as relates to the matter of enforcing contracts to convey, it must be regarded as the reasoning of the court rather than an authoritative decision, as no such question was before the court. The case of Seixas *v.* King is directly on the point, and is based upon the case of Muller *v.* Dows.

The supreme court of Ohio has taken a different view of the question. In the case of Burnley *v.* Stevenson, 24 Ohio St. 474, 478; 15 Am. Rep. 621, the doctrine that a court of chancery in one state has power to compel the specific performance of a contract in relation to lands situate in another state was considered, and the court held that a decree directing a conveyance was one *in personam*, bound the consciences of those against whom it was rendered, and was binding upon them as one fixing and determining the equities of the parties in the land when pleaded in a court of the state in which the land was situated. It was distinctly held, however, that such a decree could not transfer the title to the land in another state, and that a deed executed by a master under the direction of the court could have no greater effect, but that the court had power to compel the parties to make the conveyance by attachment as for contempt. The court say: "That courts exercising chancery powers in one state have jurisdiction to enforce a trust and compel the specific performance of a contract in relation to lands situate in another state, after having obtained jurisdiction of the persons of those upon whom the obligation rests, is a doctrine fully settled by numerous decisions. Penn *v.* Lord Baltimore, 1 Ves. 444; Massie *v.* Watts, 6 Cranch, 148; Penn *v.* Hayward, 14 Ohio St. 312, and cases therein cited. It does not follow, however, that a court having power to compel the parties

land is situated. Such legislation removes all question where lands, the subject of the same action, are located in more than one county. But it is held that where lands situated partly in one state and partly in another are covered by the same mortgage, the courts of either state have

before it to convey lands situated in another state, may make its own decree to operate as such conveyance. Indeed, it is well settled that the decree of such court *can not operate to transfer title to lands situated in a foreign jurisdiction.* And this for the reason that judgment or decree *in rem* can not operate beyond the limits of the jurisdiction or state wherein it is rendered. *And if a decree in such case can not effect the transfer of title to such lands, it is clear that a deed executed by a master, under the direction of the court, can have no greater effect.* Watts *v.* Waddle, 6 Pet. 389; Page *v.* McKee, 3 W. P. D. Bush, 135; 96 Am. Dec. 201. *The master's deed to Evans must therefore be regarded as a nullity.* The next inquiry then is as to the force and effect of the decree rendered by the circuit court directing the heirs of Gen. Scott to convey the land in Ohio to Evans. This decree was *in personam,* and bound the consciences of those against whom it was rendered. In it, the contract of their ancestor to make the conveyance was merged. The fact that the title which had descended to them was held by them in trust for Evans, was thus established by the decree of a court of competent jurisdiction. Such decree is record evidence of that fact, and also of the fact that it became and was their duty to convey the legal title to him. *The performance of that duty might have been enforced against them in that court by attachment as for contempt;* and the fact that the conveyance was not made in pursuance of the order, does not affect the validity of the decree in so far as it determined the equitable rights of the parties in the land in controversy. In our judgment, the parties, and those holding under them with notice, are still bound thereby."

According to this decision the court had power to determine the interests of the parties in the land, but could not do the very thing for which such an action is brought, viz.: compel the transfer of the title, except by attachment. Undoubtedly such a proceeding affects directly the title to the land whether the successful party can only plead it as fixing the rights of the parties therein, and *entitling* him to a conveyance, or as one actually transferring the title. And if the court can pass such a decree as will conclusively determine the rights of the parties in the land, and compel the *parties* to make the necessary conveyance, it is very difficult to see why it may not accomplish the same result by ordering a conveyance by a master who is within the jurisdiction of the court. But notwithstanding the decided cases to the contrary, it still seems that the proper and only proper place to bring an action in a case of this kind is in the state where the land is situated. In the case of Watts *v.* Waddle, 6 Pet. 389, the doctrine laid down in Burnley *v.* Stevenson is declared.

jurisdiction to order a foreclosure and sale of all the lands where the court has jurisdiction of the persons of the defendants.[1] And, as jurisdiction of the person is not necessary to the foreclosure of a mortgage, it is not necessary that personal service on the defendants be obtained. The decree may be rendered on constructive notice.[2]

In the federal courts, where jurisdiction is founded on diversity of citizenship, the action is required to be brought in the district of residence of either the plaintiff or the defendant.[3]

It is further held, in this connection, that a railroad, or telegraph company, chartered either by the state or by the United States, is an inhabitant of every state in which it operates its lines and maintains offices for the transaction of business, within the meaning of the statute fixing the jurisdiction of the courts.[4] But it is the established doctrine of later cases that a corporation incorporated in one state only can not be compelled to answer in the Circuit Court of the United States in another state in which it has its usual place of business.[5]

A corporation, for the purposes of jurisdiction in the United States courts, is deemed to be a citizen of the state creating it, and no averment to the contrary is permitted.[6] But it has been held that a corporation created in one state and doing business in another, with the permission of the latter, is also a citizen of the state in which it does business.[7] A different rule has been established, however, as affecting the right to sue a corporation out of the state of its incorporation.[5]

[1] McElrath *v.* The Pittsburg, etc., R. R. Co., 55 Pa. St. 189; Muller *v.* Dows, 94 U. S. 449.

[2] *Ante*, sec. 12. [3] 24 Stat. at L., p. 552, c. 373.

[4] United States *v.* Southern Pac. R. Co., 49 Fed. Rep. 297.

[5] *Post*, sec. 43, p. 321; Shaw *v.* Quincy Mining Co., 145 U. S. 444; 12 Sup. Ct. Rep. 935; Southern Pac. Co. *v.* Denton, 146 U. S. 202; 13 Sup. Ct. Rep. 44.

[6] United States *v.* Southern Pac. R. Co., 49 Fed. Rep. 302.

[7] Goodlett *v.* Railroad Co., 122 U. S. 391; 7 Sup. Ct. Rep. 1254.

In United States *v.* Southern Pac. R. Co., 49 Fed. Rep. 303, Mr. Justice Harlan, after reviewing the authorities, said: "If it be said that inhab-

A corporation created by the laws of several states is a citizen of either for the purposes of jurisdiction.[1]

Where a corporation owns property, covered by mortgages, in different states, a federal court in one district can not, by the appointment of a receiver, bring the entire property within its jurisdiction, and thereby prevent any of the mortgagees from foreclosing their mortgages upon property in another state, in the federal court having jurisdiction in the latter state, nor is the appointment of the receiver binding upon the latter court so far as it affects the real estate within its jurisdiction.[2]

The general rule is that no court has power to appoint a receiver over property not within its jurisdiction, and that such an appointment can not give it extra-territorial jurisdiction over property.[3]

The authority of a receiver is co-extensive only with the jurisdiction of the court by whom he is appointed, and state comity does not require one state to permit a receiver, appointed by a court of another state, to pursue legal remedies therein to the detriment of its citizens.[4]

The general rule on the subject is, that a receiver appointed in one state has no right to sue, as such, in the

itancy in a state, in its strict legal sense, implies a permanent fixed residence in that state, the answer is that a corporation of one state, operating, by agents, a railroad or telegraph line in another state, with its consent, or under its license, may be regarded as permanently identified with the business and people of the latter state, and, for the purposes of its business there, to have a fixed residence within its limits; for it may not unreasonably be assumed that it will exert its powers there during the whole of its corporate existence, or so long as it is profitable to do so. It does there just what it would do if it had received its charter from that state. It seems to the court that a corporation of a state, or a corporation of the United States, holding such close relations with the business and people of another state, may, within a reasonable interpretation of the act of 1887, be deemed an 'inhabitant' of the latter state for all purposes of jurisdiction *in personam* by the courts held there; although a corporation is, and, while its corporate existence lasts, must remain a 'citizen' only of the state which gave it life."

[1] Railway Co. *v.* Whitton, 13 Wall. 270; Union Trust Co. *v.* Rochester & P. R. Co., 29 Fed. Rep. 609.

[2] Atkins *v.* Wabash, St. L. & P. Ry. Co., 29 Fed. Rep. 172.

[3] Booth *v.* Clark, 17 How. 322; Atkins *v.* Wabash, St. L. & P. Ry. Co., 29 Fed. Rep. 161.

[4] Hunt *v.* Columbian Ins. Co., 55 Me. 290; 92 Am. Dec. 592; Humphreys *v.* Hopkins, 81 Cal. 551; 22 Pac. Rep. 892; Booth *v.* Clark, 17 How. 322, 330; Day *v.* Postal Tel. Co., 66 Md. 354; 7 Atl. Rep. 608.

courts of another state, but that, as a matter of comity, he will be permitted to sue so long as the exercise of the right does not conflict with the rights of creditors or other citizens of the state in which the action is brought.[1] But there are cases holding that the authority of a court to appoint a receiver is not confined to the property within its jurisdiction, but that it may extend the authority of the receiver to property in another state, and that, as a matter of comity, his right to the control of the property will be recognized by the latter state, unless the exercise of his rights conflicts with its laws or the rights of its citizens.[2] And, as affecting corporations, state legislation may be such as to bring all of the property of an insolvent corporation within the jurisdiction of the courts of the state where the corporation is doing business, for the purpose of winding up its affairs, and vest in receivers appointed, the right to extend their authority to property belonging to the corporation, in another state, even as against creditors there.[3]

So it is held that where property has come into the possession of a receiver under his appointment, in the state where he is appointed, he may follow the same into another state and maintain his right to it as against attaching creditors there.[4]

This, however, is placed upon the ground that by taking possession of the property within the jurisdiction of his appointment a special property vested in him, that, being valid there, would be recognized every-where.[5]

[1] Humphreys *v.* Hopkins, 81 Cal. 551; 22 Pac. Rep. 892; Booth *v.* Clark, 17 How. 322, 330; Allen *v.* Caspari, 8 Me. 234; 6 Am. St. Rep. 178, 185, note; Bank *v.* McLeod, 38 Ohio St. 174; Sohernheimer *v.* Wheeler, 45 N. J. Eq. 614; 18 Atl. Rep. 234; Boulware *v.* Davis, 90 Ala. 207; 8 South. Rep. 84; Dyer *v.* Power, 14 N. Y. Sup. 873; 60 Hun, 583.

[2] Bank *v.* McLeod, 38 Ohio St., 183; Hurd *v.* Elizabeth, 41 N. J. L. 1.

[3] Relfe *v.* Rundle, 103 U. S. 222; Parsons *v.* Charter Oak L. Ins. Co., 31 Fed. Rep. 305.

[4] Chicago, etc., R. R. Co. *v.* Keokuk, etc., Packet Co., 108 Ill. 317; 48 Am. Rep. 557; Pond *v.* Cook, 45 Conn. 126; 29 Am. Rep. 668.

[5] But see on this point Humphreys *v.* Hopkins, 81 Cal. 552; 22 Pac. Rep. 892.

16. Jurisdiction as to amount.—Courts are sometimes limited in their jurisdiction by a constitutional or statutory provision that they shall have jurisdiction where the amount in controversy shall exceed, or shall not exceed, a certain sum.[1] Where such limitation is imposed, a court has no authority to entertain a case not within the amount fixed by law. Where the jurisdiction is limited to a certain sum by the constitution of a state the legislature can not increase such jurisdiction.[2]

The question as to what shall control in determining what is the amount in controversy frequently arises. The rule usually adopted is, that the amount alleged in the pleading of the plaintiff, the *ad damnum* clause, controls.[3]

In some of the cases the prayer for relief is held to control.[4] In others, that parol proof will be heard to show the actual amount in controversy and oust the jurisdiction.[5]

The courts have not always held themselves bound by the damages alleged in the complaint, where that is held to be the test of jurisdiction. Where it is apparent that the amount is alleged in bad faith it will be disregarded.[6] Where the complaint contains more than one count, setting up different causes of action, properly joined, the totals of all the counts will determine the question of jurisdiction.[7] But it has been held that it is the conclusion of the pleading that must control, and that where there are several counts showing more than the jurisdictional amount, but one general demand for damages is made, at the close of the pleading, for an amount within

[1] 12 Am. & Eng. Enc. of Law, 283.

[2] Zander *v.* Coe, 5 Cal. 230; Small *v.* Girvin, 6 Cal. 447; *post*, sec. 24.

[3] 1 Work's Ind. Prac. & Pl., sec. 30; Short *v.* Scott, 6 Ind. 430; Lord *v.* Goldberg, 81 Cal. 599; 22 Pac. Rep. 1126; Greenbaum *v.* Martinez, 86 Cal. 461; 25 Pac. Rep. 12; Stone *v.* Murphy, 2 Ia. 35; Culbertson *v.* Tomlinson, 1 Mor. (Ia.) 404; Abbott *v.* Gatch, 13 Md. 314; 71 Am. Dec. 643.

[4] Alexander *v.* Thompson, 38 Tex. 533.

[5] Collins *v.* Collins, 37 Pa. St. 387, 390.

[6] Fix *v.* Sissung, 83 Mich. 561; 47 N. W. Rep. 340.

[7] Wetherill *v.* Inhabitants, etc., 5 Blkf. (Ind.) 357; Short *v.* Scott, 6 Ind. 430.

the jurisdiction of the court, this general conclusion controls and the court has jurisdiction.[1]

Where an account is filed as the cause of action, without a pleading, as is sometimes allowed, the footing of the account controls.[2]

Where two are joined as defendants, and the amount shown to be due from one of them is large enough to give jurisdiction, it has been held that in the absence of any objection of misjoinder of parties the jurisdiction of the court, as to both defendants, will be maintained.[3] But where the action is against defendants, properly joined, but who are severally liable for different amounts, if the sum due from any one of the defendants is less than the jurisdictional amount, the court has no jurisdiction of the action, as against him, although the amount claimed from other defendants may be sufficient to give jurisdiction as to them.[4]

It has been held that where the complaint alleges an amount of damages within the jurisdiction of the court, but the verdict of the jury fixes it at a sum below the jurisdictional amount, the case should be dismissed.[5] So where in replevin the affidavit states the value within the jurisdiction of the court, but the judgment of the court is to the contrary.[6]

Usually statutory provisions fixing the amount necessary to give jurisdiction exclude interest and costs. This is the provision of the statute of the United States giving jurisdiction to the federal courts; and in an action on coupon bonds the amount due on the coupons is interest and

[1] Culley *v.* Laybrook, 8 Ind. 285.

[2] Mitchell *v.* Smith, 24 Ind. 252. In this case the rule was adhered to although upon a calculation it appeared that the footing was erroneous, and that if the footing had been correctly stated the jurisdiction of the court would have been ousted.

[3] Cotter *v.* Parks, 80 Tex. 539; 16 S. W. Rep. 307.

[4] Thomas *v.* Anderson, 58 Cal. 99; Derby *v.* Stevens, 64 Cal. 287; Hyman *v.* Coleman, 82 Cal. 650; 23 Pac. Rep. 62.

[5] Louisville, etc., R. W. Co. *v.* Johnson, 67 Ind. 546.

[6] Darling *v.* Conklin, 42 Wis. 478.

must be excluded in arriving at the jurisdictional amount.[1]

And protest fees are part of the costs and not of the "matter in dispute."[2]

Where a note provides for an attorney's fees it is part of the indebtedness and not interest or costs.[3]

In some of the states, if the amount of recovery is below the jurisdictional amount, the judgment will be set aside and the action dismissed unless the amount is reduced by a set-off.[4] But the general rule is that the recovery of an amount less than is necessary to give the court jurisdiction will not affect the jurisdiction of the court to render and enforce judgment for such amount, the only effect of such a result being to cast the costs of the action on the plaintiff.[5] And where the amount found due is in excess of the jurisdictional amount the excess may be remitted and judgment taken for the balance.[6]

A plaintiff may bring his action for less than is due him, remitting the balance, and thus bring his case within the jurisdiction of an inferior court.[7]

This right to waive a part of his claim, in order to give jurisdiction, is sometimes given by statute.[8] And if the plaintiff limits his *ad damnum* clause to an amount within the jurisdiction of the court, this of itself operates as a remitter of the excess over that sum.[9] At least it will

[1] Howard *v.* Bates County, 43 Fed. Rep. 276.

[2] Baker *v.* Howell, 44 Fed. Rep. 113.

[3] Moore *v.* Foy, 15 S. W. Rep. 199.

[4] Camp *v.* Marion, 91 Ala. 240; 8 So. Rep. 786.

[5] Jackson *v.* Whartenby, 5 Cal. 95; Derby *v.* Stevens, 64 Cal. 287; Abbott *v.* Gatch, 13 Md. 314; 71 Am. Dec. 643.

[6] Velvin *v.* Hall, 78 Ga. 136.

[7] Stewart *v.* Thompson, 85 Ga. 829; 11 S. E. Rep. 1030; Fuller *v.* Sparks, 39 Tex. 136; Hempler *v.* Schneider, 17 Mo. 258; Denning *v.* Eckelkamp, 30 Mo. 140; Matlack *v.* Lare, 32 Mo. 262; Litchfield *v.* Daniels, 1 Col. 268; Bennett *v.* Ingersoll, 24 Wend. 113; Dowditch *v.* Salisbury, 9 Johns. 366; Raymond *v.* Strobel, 24 Ill. 114; Grayson *v.* Williams, 12 Am. Dec. 570, n.; Koraski *v.* Foster, 20 Ill. 34.

[8] Quimby *v.* Hopping, 52 N. J. L. 117; 19 Atl. Rep. 123.

[9] Litchfield *v.* Daniels, 1 Col. 268.

be presumed, where he demands less, that he has remitted the excess.[1]

A running account, consisting of several items, can not be divided to give jurisdiction.[2]

It is held in some cases that where "the sum demanded" determines the jurisdiction a remitter of a part of the amount demanded, after suit brought, will not give jurisdiction.[3] And in others it is held that where a remitter of a part of the claim actually due is made before the action is brought, and the suit is for an amount within the jurisdiction, the court can not entertain it.[4]

A plaintiff may give the court jurisdiction by failing to claim interest on his demand.[5]

In the federal courts, the amount necessary to give the court power to act is a jurisdictional fact that must be properly averred in the complaint or bill, or the court will refuse to assume jurisdiction of the cause.[6]

In an action to quiet title to real estate, the whole value of the land is the test of jurisdiction.[7] So in an action to set aside fraudulent conveyances, the amount in controversy is the value of the land alleged to have been fraudulently conveyed.[8]

[1] Bowditch *v.* Salisbury, 9 Johns. 366.

[2] Grayson *v.* Williams, Walker, 298; 12 Am. Dec. 568.

[3] Peter *v.* Schlosser, 81 Pa. St. 440.

[4] Collins *v.* Collins, 37 Pa. St. 387, 390; Bower *v.* McCormick, 73 Pa. St. 429; Simpson *v.* Rawlings, 1 Scam. (Ill.) 28; Sands *v.* Delap, 1 Scam. (Ill.) 167. But see Evans *v.* Hall, 45 Pa. St. 237, in which it was held that a plaintiff might remit or fail to claim a part of the *interest* due him, and thus bring his case within the jurisdiction of the court, although, in that state, interest is not excluded in computing the amount demanded. The case of Simpson *v.* Rawlings, 1 Scam. (Ill.) 28, was controlled by a direct statutory provision making the whole amount of the contract sued on the test. This rule was changed by later statutes. Raymond *v.* Strobel, 24 Ill. 114.

[5] Simpson *v.* Updegraff, 1 Scam. (Ill.) 594; Bates *v.* Bulkley, 2 Gil. 389; Evans *v.* Hall, 45 Pa. St. 237.

[6] *Ante*, sec. 12: Lehigh, etc., Iron Co. *v.* New Jersey, etc., Iron Co., 43 Fed. Rep. 546; Oleson *v.* Northern Pac. R. Co., 44 Fed. Rep. 1.

[7] Lehigh, etc., Iron Co. *v.* New Jersey, etc., Iron Co., 43 Fed. Rep. 545; Lovett *v.* Prentice, 44 Fed. Rep. 459.

[8] Simon *v.* House, 46 Fed. Rep. 317.

In the federal courts, the value of the matter in controversy, as alleged in the bill or complaint, is not conclusive. It may be shown to be less by the evidence in support of a plea to the jurisdiction, and a dismissal secured.[1]

The value of the property is what it could be sold for in the ordinary course of business.[2]

A successful defense as to a part of the claim, whereby the amount is reduced below the jurisdictional amount, does not oust the jurisdiction of the court.[3]

Where, in a creditor's bill, the amount claimed by the original plaintiff is above the jurisdictional amount, other creditors may come in and assert their claims, although the amount due them would not, alone, be sufficient to give the court jurisdiction; and where the fund to be distributed, in such a case, exceeds $5,000, the appellate jurisdiction of the supreme court of the United States is not affected by the fact that the amounts decreed to some of the creditors is less than that sum.[4]

The fact that the defendant has set up a counter claim, or set-off, does not affect the question of jurisdiction. It is the amount that the plaintiff puts in controversy that controls.[5] The general rule is that where the sum claimed is reduced by a set-off, below the jurisdictional amount, the power of the court to render judgment is not thereby affected.[6]

A receiver of a national bank may sue in the United States circuit court, without regard to the amount involved, under the statute authorizing officers of the United States to sue in the federal courts.[7] And the same rule applies where the action is by an "agent" of a national

[1] Simon *v.* House, 46 Fed. Rep. 317.

[2] Berthold *v.* Hoskins, 38 Fed. Rep. 772.

[3] Hardin *v.* Cass County, 42 Fed. Rep. 652.

[4] Handley *v.* Stutz, 139 U. S. 417; 11 Sup. Ct. Rep. 117.

[5] Lord *v.* Goldberg, 81 Cal. 599; 22 Pac. Rep. 1126; Livingston *v.* L'Engle, 27 Fla. 502; 8 Sou. Rep. 728; Gillespie *v.* Benson, 18 Cal. 410; Odell *v.* Culbert, 9 Watts & Serg. 66; 42 Am. Dec. 317.

[6] Odell *v.* Culbert, 9 Watts & Serg. 66; 42 Am. Dec. 317.

[7] Rev. Stat. U. S., sec. 629, sub. 3; Armstrong *v.* Ettlesohn, 36 Fed. Rep. 209; Yardley *v.* Dickson, 47 Fed. Rep. 835.

bank, appointed under the national banking act to take the place of the receiver.[1]

The limitation as to amount necessary to give the circuit court jurisdiction does not apply where the United States is plaintiff or petitioner.[2]

As to what shall be considered the amount in controversy, as affecting the jurisdiction of the appellate courts, the authorities are not uniform. It is not only necessary that a sufficient amount to give jurisdiction was in controversy in the court below, but on appeal it must appear that the controversy as to that amount is continued by the appeal.[3]

In some cases the same test that determines the right of the court of original jurisdiction to act in the case is applied in the appellate court. Thus, it is held that where the amount in controversy in a justice's court is the sum demanded in the complaint, the appellate court, whose jurisdiction is in the same amount, has jurisdiction, although the amount of the *judgment*, if regarded as the amount in controversy, would not be within its appellate jurisdiction.[4]

Sometimes it is held that the amount in controversy in the appellate court is the difference between the amount demanded in the complaint and the amount of the judgment, where the appeal is by the plaintiff from a judgment in his favor for less than his complaint demands;[5] and that where the defendant appeals, the amount of the judgment controls.[6]

[1] 1 Sup. Rev. Stat., 2d ed., p. 107; McConville *v.* Gilmour, 36 Fed. Rep. 277.

[2] United States *v.* Shaw, 39 Fed. Rep. 433.

[3] McCoy *v.* McCoy, 33 W. Va. 60; 10 S. E. Rep. 19.

[4] Solomon *a.* Reese, 34 Cal. 28; Dalshiel *v.* Slingerland, 60 Cal. 653.

[5] Votan *v.* Reese, 20 Cal. 90; Skillman *v.* Lachman, 23 Cal. 198; 83 Am. Dec. 96.

[6] Votan *v.* Resse, 20 Cal. 90; Ex parte Sweeney, 126 Ind. 583; 27 N. E. Rep. 127, 129; Louisville, etc., R'y Co. *v.* Coyle, 85 Ind. 516; Bogart *v.* The City of New Albany, 1 Ind. 38; Overton *v.* Overton, 17 Ind. 226; Board of Commissioners *v.* Diebold Safe & Lock Co., 133 U. S. 473; 10 Sup. Ct. Rep. 399; District of Columbia *v.* Gannon, 130 U. S. 227; 9 Sup.

There may be an appeal by a plaintiff from a judgment in his favor for less than the jurisdictional amount. In such cases, the usual test of the amount alleged by him in his complaint must be applied.[1]

Where the amount of the verdict is below the jurisdictional amount, but by reason of the accumulation of interest thereon the judgment is above it, the appellate court has jurisdiction.[2] But the accumulation of interest on the judgment can not give the supreme court jurisdiction where the judgment has been rendered in the trial court for less than the jurisdictional amount, and affirmed on appeal to an intermediate court of appeal, at which time the accumulated interest has, if included, increased the actual amount then due on the judgment to a sum sufficient to give jurisdiction.[3]

But, where the original judgment is for a certain sum, and interest from the date of the judgment, and, at the time of the affirmance below, the accumulated interest has increased the amount to a sum within the jurisdiction of the supreme court, the latter court has jurisdiction of the appeal.[4] And so, if, by the judgment of affirmance appealed from, interest sufficient to increase the sum to the jurisdictional amount is directed to be added to the judgment of the trial court.[5]

Where the amount in controversy does not appear from the record, the burden of showing that it is sufficient to give the Supreme Court of the United States jurisdiction rests upon the plaintiff in error.[6] It is otherwise, if the court below has found the value,[7] or where the appeal has

Ct. Rep. 508; Painter *v.* Guirl, 71 Ind. 240; Sprinkle *v.* Toney, 73 Ind. 592.

[1] Elliott's App. Pro., sec. 60.

[2] Board of Commissioners *v.* Diebold Safe & Lock Co., 133 U. S. 473; 10 Sup. Ct. Rep. 399.

[3] District of Columbia *v.* Gannon, 130 U. S. 227; 9 Sup. Ct. Rep. 508; Openshaw *v.* Utah & N. R'y Co., 21 Pac. Rep. 999; Johnson *v.* Tully, 12 Pac. Rep. 567; Elliott's App. Pro., sec. 61.

[4] Zeckendorf *v.* Johnson, 123 U. S. 617; 8 Sup. Ct. Rep. 261.

[5] District of Columbia *v.* Gannon, 130 U. S. 227; 9 Sup. Ct. Rep. 508.

[6] Wilson *v.* Blair, 119 U. S. 387; 7 Sup. Ct. Rep. 230.

[7] Zeigler *v.* Hopkins, 117 U. S. 683; 6 Sup. Ct. Rep. 919.

been allowed by the court below, and there is evidence to sustain the right of appeal.[1]

It is held in some of the cases that the amount in controversy is to be determined "from the pleadings, and not from the formal demand for judgment."[2] This is subject, however, to the rule above stated that, where the judgment is for the plaintiff and the defendant appeals, the amount of the judgment controls.[3]

Where the amount of the judgment controls, the plaintiff may remit enough of his verdict to bring the judgment below the amount fixed, and this deprives the appellate court of jurisdiction.[4] But this can not be done after the jurisdiction of the supreme court has attached.[5] And the trial court may refuse to permit the remitter, and should do so if it is apparent that the object is to prevent an appeal.[6]

Again, it is held that, where the appeal is by the plaintiff, the amount of his claim is the amount in controversy.[7]

Generally it is held that in arriving at the amount in controversy in the appellate court, the demand for relief is not conclusive, but the body of the pleading may be looked to to ascertain the amount.[8]

If the court in which the action is brought has not jurisdiction of the amount in controversy, the appellate court is without jurisdiction, although it might have

[1] Gage *v.* Pumpelly, 108 U. S. 164; 2 Sup. Ct. Rep. 230.

[2] Ex parte Sweeney, 126 Ind. 583; 27 N. E. Rep. 127; Elliott's App. Pro., sec 56.

[3] Ex parte Sweeney, 126 Ind. 583; 27 N. E. Rep. 127.

[4] First National Bank *v.* Redick, 110 U. S. 224; 3 Sup. Ct. Rep. 640; Alabama, etc., Life Ins. Co. *v.* Nichols, 109 U. S. 232; 3 Sup. Ct. Rep. 120; Elliott's App. Pro., sec. 62.

[5] New York Elevated R. Co. *v.* Fifth Nat. Bank, 118 U. S. 608; 7 Sup. Ct. Rep. 23.

[6] Alabama, etc., Life Ins. Co. *v.* Nichols, 109 U. S. 232; 3 Sup. Ct. Rep. 120.

[7] Beach *v.* Livergood, 15 Ind. 496; Morton Gravel Road Co. *v.* Wysong, 51 Ind. 4.

[8] Lee *v.* Watson, 1 Wall. 339; Ex parte Sweeney, 126 Ind. 583; 27 N. E. Rep. 129.

taken original cognizance of the case.[1] And if the plaintiff, after the cause reaches the appellate court in which the case is to be tried *de novo*, so amends his complaint as to increase the amount in controversy to a sum in excess of the jurisdictional amount in the court below, the jurisdiction of the appellate court is thereby ousted, and the cause must be dismissed.[2]

It is held otherwise in some cases, but they seem to be founded upon the peculiar language of the statutes of the states in which they were rendered, indicating that the appellate court should try and dispose of the cases as if they had been originally brought before them.[3]

It will be observed that there is considerable conflict and uncertainty in the decisions relating to this subject, particularly as to the means and manner of ascertaining the amount in controversy, in attempting to determine whether a court has or has not jurisdiction. For these reasons, many of the propositions referred to have not been stated to be so, but that they have been *held* to be so, which is not a satisfactory way of putting it. But there are certain propositions bearing upon and affecting this subject of jurisdiction as to amount that may be safely stated, in conclusion, as established by the clear weight of authority. They are that in a court of original jurisdiction the *ad damnum* clause in the plaintiff's pleading fixes the amount in most courts, conclusively, but in some only *prima facie*. That in an appellate court in which the cause is tried *de novo* the same rule prevails, but where the appeal is to a court of errors, if the plaintiff appeals, the same test is applied, and if the appeal is by the defendant, the amount of the judgment is the amount in controversy. In the federal courts the ques-

[1] Klaise *v.* The State, 27 Wis. 462; Mays *v.* Dooley, 59 Ind. 287; Pritchard *v.* Bartholomew, 45 Ind. 219; Stringham *v.* Board of Supervisors, 24 Wis. 594; Boyce *v.* Foote, 19 Wis. 215; Berroth *v.* McElvain, 41 Kan. 269; 20 Pac. Rep. 850; Levi *v.* Sherman, 6 Ark. 182; 42 Am. Dec. 690; Horan *v.* Wahrenberger, 9 Tex. 313; 58 Am. Dec. 145; People *v.* Skinner, 13 Ill. 287; 54 Am. Dec. 432.

[2] Pritchard *v.* Bartholomew, 45 Ind. 219.

[3] Dressler *v.* Davis, 12 Wis. 58, and cases cited.

tion as to the amount in controversy is open to proof even by parol. If the value of the property in controversy appears from the record, by the plaintiff's pleading or otherwise, this fixes the amount *prima facie*, but it may be disproved by parol and the want of jurisdiction established. If the appeal is by the defendant, from a money judgment, the amount is fixed by the judgment itself, as in other courts.

17. Exclusive and concurrent jurisdiction.—Exclusive and concurrent jurisdiction have been defined.[1]

Where exclusive jurisdiction of a subject-matter is given to one court, no other court can entertain such jurisdiction.[2] If, in this country, such jurisdiction is given by the constitution of the United States, or of a state, the same can not be conferred upon any other court by legislative enactment.[3] If, however, the constitution gives a court jurisdiction over a subject-matter, without making it exclusive, the legislature may confer the same jurisdiction upon another court, thereby making the jurisdiction concurrent in the two courts.[4] But the constitutional jurisdiction existing in the first court can not be taken away by statute.[5]

Where jurisdiction is given by the constitution, it may be enlarged, but not diminished, by the legislature.[6] But the enlargement of jurisdiction must not be such as to change the fundamental nature, or local character, of the court.[7]

Where two or more courts have concurrent jurisdiction, the one which first takes cognizance of a cause has the exclusive right to entertain and exercise such jurisdiction,

[1] *Ante*, sec. 9.

[2] Stanhart *v.* Sitley, 19 Atl. Rep. 464.

[3] Harris *v.* Vanderveer, 21 N. J. Eq. 424; Hutkoff *v.* Demorest, 103 N. Y. 377; 8 N. E. Rep. 899; In re Cleveland, 51 N. J. Law, 311; 17 Atl. Rep. 772; *post*, sec. 24.

[4] Courtwright *v.* Bear R. W. & M. Co., 30 Cal. 573; Wells' Jur., sec. 154; Berkowitz *v.* Lester, 121 Ill. 99; 11 N. E. Rep. 860; Clepper *v.* The State, 4 Tex. 242; *post*, sec. 24.

[5] *Post*, sec. 24.

[6] Harris *v.* Vanderveer, 21 N. J. Eq. 424.

[7] Landers *v.* Staten Island R. R. Co., 53 N. Y. 450.

to the final determination of the action and the enforcement of its judgment or decree.[1]

The rule is that one court of concurrent jurisdiction has no power to interfere with the judgments or decrees of other courts of the same jurisdiction.[2] Therefore, one court of co-ordinate jurisdiction will not restrain, by injunction, proceedings previously instituted in another court.[3]

And the rule extends to the processes of the court, whether mesne or final.[4] But the protection thus extended to an officer acting under process does not protect him from an action of trespass in another court, where he goes beyond the command of the writ with respect to the person to be affected or the property to be seized. Accordingly, it is held that an officer of a United States court who levies a writ upon the property of one against whom the writ does not run, or upon property which is not liable to the writ, may be sued in a state court for trespass.[5] It is held, however, by the supreme court of the United States, that where property, not named in the writ, is wrongfully seized, the owner can not obtain possession of it by resort to the courts of another jurisdiction.[6]

But while the owner of the property can not obtain possession thereof by resorting to a state court, he may

[1] Wells' Jur., sec. 156; Ober *v.* Gallagher, 93 U. S. 199; Merrill *v.* Lake, 16 Ohio, 373; 47 Am. Dec. 377; Booth *v.* Ableman, 16 Wis. 460; 84 Am. Dec. 711; Taylor *v.* City of Fort Wayne, 47 Ind. 274; Ex parte Bushnell, 8 Ohio St. 599; Powers *v.* City Council of Springfield, 116 Mass. 84; Clepper *v.* The State, 4 Tex. 242.

[2] Anthony *v.* Dunlap, 8 Cal. 26; Rickett *v.* Johnson, Id. 34; Ex parte Booth, 3 Wis. 145; Uhlfelder *v.* Levy, 9 Cal. 608; Mail *v.* Maxwell, 107 Ill. 554; Dodge *v.* Northrop, 85 Mich. 243; 48 N. W. Rep. 505.

[3] Platto *v.* Deuster, 22 Wis. 482; Uhlfelder *v.* Levy, 9 Cal. 608; Hockstacker *v.* Levy, 11 Cal. 76.

[4] Buck *v.* Colbath, 3 Wall. 334; Taylor *v.* Carryl, 20 How. 583; Judd *v.* Bankers & Merchants Tel. Co., 31 Fed. Rep. 182; Gilbert *v.* Renner, 95 Mo. 151; 7 S. W. Rep. 479; Mellier *v.* Bartlett, 89 Mo. 134; 1 S. W. Rep. 220.

[5] Buck *v.* Colbath, 3 Wall. 334.

[6] Freeman *v.* Howe, 24 How. 450; Buck *v.* Colbath, 3 Wall. 334.

This doctrine has not been accepted without dissent. A different conclusion was reached by the supreme court of Massachusetts in the case

prosecute the officer making the wrongful seizure, in such court, and the fact that the writ under which he assumed to act was issued out of a federal court is no defense. The right to proceed against the officer in trespass does not interfere with the property in the possession of the federal court, and, therefore, the reason for denying the

of Freeman *v.* Howe (Howe *v.* Freeman, 80 Mass. 566), and this conclusion is supported by the opinion of Chancellor Kent.

"If the officer of the United States who seizes, or the court which awards the process to seize, has jurisdiction of the subject-matter, then the inquiry into the validity of the seizure belongs exclusively to the federal courts. But if there be no jurisdiction in the instance in which it is asserted, as if a marshal of the United States, under an execution in favor of the United States against A, should seize the person or property of B, then the state courts have jurisdiction to protect the person and the property so illegally invaded." 1 Kent's Com. 410.

In the later case of Buck *v.* Colbath, the supreme court say: "Upon the merits of the case the plaintiff in error relies mainly on the case of Freeman *v.* Howe, 24 How. 450, decided by this court, and upon the opinion by which the court sustained the decision. That was a case like this in every particular, with the single exception that when the marshal had levied the writ of attachment on certain property, a writ of replevin was instituted against him in the state court, and the property taken out of his possession, while in the present case the officer is sued in trespass for the wrongful seizure. In that case it was held, that although the writ of attachment had been wrongfully levied upon the property not named in the writ, the rightful owner could not obtain possession of it by resort to the courts of another jurisdiction. It must be confessed that this decision took the profession, generally, by surprise, overruling, as it did, the unanimous opinion of the supreme court of Massachusetts—a court whose opinions are always entitled to great consideration—as well as the opinion of Chancellor Kent, as expressed in his Commentaries, vol. 1, p. 410. We are, however entirely satisfied with it and with the principle upon which it is founded; a principle which is essential to the dignity and just authority of every court, and to the comity which should regulate the relations between all courts of concurrent jurisdiction. That principle is, that whenever property has been seized by an officer of the court by virtue of its process, the property is to be considered as in the custody of the court, and under its control for the time being; and that no other court has a right to interfere with that possession, unless it be some court which may have a direct supervisory control over the court whose process has first taken possession, or some superior jurisdiction in the premises. This is the principle upon which the decision of this court rested in Taylor *v.* Carryl, 20 How. 583, and Hagan *v.* Lucas, 10 Pet. 400, both of which assert substantially the same doctrine."

owner the right to recover his property in the state court does not apply.[1]

Where property in the hands of an officer of a federal court has been taken out of his possession in an action of replevin in a state court, and delivered to the alleged owner, the court may and should so far exercise jurisdiction as to order the return of the property to the officer upon the refusal of the court to proceed with the case.[2]

If the court first assuming jurisdiction has not the power to carry the cause to a final and appropriate conclusion, or grant the necessary relief to either of the parties, the aid of another court, having such power, may be called for, and its jurisdiction may be properly exercised.[3]

This exercise of jurisdiction by two courts of concurrent jurisdiction frequently occurs where a given cause of action entitles the injured party to both a legal and an equitable remedy, or the defendant has a defense that can not avail him except in a court of equity, and a court of law has first taken cognizance of the case and is unable to afford the equitable relief necessary to the protection of the party's rights and interests. Here the two courts have concurrent jurisdiction of the subject-matter, but the relief that may be administered by the two courts is different. In such cases both the common law and equity courts may exercise their appropriate functions in the same case in order to afford the litigant full and adequate relief.[4]

[1] In the case of Buck *v.* Colbath, 3 Wall. 334, the court, after approving the doctrine that replevin would not lie in the state court, and stating the principle upon which the doctrine rests, said: "It is obvious that the action of trespass against the marshal, in the case before us, does not interfere with the principle thus laid down and limited. The federal court could proceed to render its judgment in the attachment suit, could sell and deliver the property attached, and have its execution satisfied without any disturbance of its proceedings, or any contempt of its process, while, at the same time, the state court could proceed to determine the questions before it involved in the suit against the marshal without interfering with the possession of the property in dispute."

[2] Booth *v.* Ableman, 16 Wis. 460; 84 Am. Dec. 711.

[3] Anthony *v.* Dunlap, 8 Cal. 26; Ackerly *v.* Vilas, 15 Wis. 401.

[4] Uhlfelder *v.* Levy, 9 Cal. 607; Akerly *v.* Vilas, 15 Wis. 401.

For example, in an action at law the necessity for an injunction may arise, which can only be had in a court of equity. In such a case a court of equity, having concurrent jurisdiction with the law court, may exercise its right to issue such injunction, or render other equitable remedies necessary to preserve the rights of the party, and render his judgment at law effective. And in order to protect the rights of a party that can only be enforced in a court of equity, such court may restrain proceedings in the cause in a court of law by injunction.[1]

This may be done, also, where a suit is pending in a court of equity, and the party institutes a new suit in a court of law on the ground that the bringing of the second suit is a contempt of the court first taking jurisdiction.[2] It must not be understood, however, that the court in which the action is brought can be enjoined. The injunction runs against the party and not the court.[3]

The general rule is that in actions *in rem*, the court, under whose process the property is seized, has exclusive jurisdiction.[4] But where, by statute, jurisdiction of the thing may be acquired by service of process on the owner or other person, such jurisdiction is not necessarily exclusive, but may exist in several courts at the same time and over the same subject. If, however, at any stage of the proceedings, any one of the courts of concurrent jurisdiction has made an actual seizure of the property under mesne or final process, such court has exclusive power over its disposal and the distribution of the fund arising therefrom.[4]

Where a new right is created by statute and a particular remedy prescribed, and the statute provides that this remedy must be pursued in a particular court, the jurisdiction of such court to afford the remedy provided for is

[1] Ackerly *v.* Vilas, 15 Wis. 401; Ex parte City Bank of New Orleans, 3 How. 292.

[2] Blanchard *v.* Stone, 16 Vt. 234; Conover *v.* Mayor, etc., of New York, 25 Barb. 513.

[3] Ex parte The City Bank of New Orleans, 3 How. 292.

[4] Averill *v.* Steamer Hartford, 2 Cal. 308.

exclusive.[1] But the jurisdiction of the federal courts, given by the constitution, can not be taken away by a state statute creating a right and providing that litigation with reference thereto shall be carried on in a certain state court.[2]

An action brought against a vessel, by name, calls for the exercise of admiralty jurisdiction, which belongs exclusively to the United States district courts, and can not be exercised by a state court. This jurisdiction of the federal courts is not confined to tide waters, but extends to other navigable lakes and streams.[3] But the right to a common law remedy, where the common law is competent to give it, is excepted, and such common law remedy may be enforced in the state courts.[4]

The peculiar relations existing between the federal and state courts give them concurrent jurisdiction in many cases, and authorize the transfer from the state to the federal courts upon application made by the proper party.[5] In this way a cause pending in a court of concurrent jurisdiction may, upon the demand of one of the parties, be transferred and vested in another court of co-ordinate jurisdiction.[6] So the jurisdiction of a court may be ousted by the creation of a new court vested with power to hear and determine matters formerly within its jurisdiction.[7] The same act may constitute an offense against the United

[1] Reed *v.* Omnibus R. R. Co., 33 Cal. 216; Spencer Creek Water Co. *v.* Vallejo, 48 Cal. 70.

[2] Mercer *v.* Cowles, 7 Wall. 118; Lincoln County *v.* Luning, 133 U. S. 529; 10 Sup. Ct. Rep. 363: Vincent *v.* Lincoln Co., 30 Fed. Rep. 749.

[3] Rev. Stat. U. S., sec. 563, sub. 8; Taylor *v.* Hammons, 4 Wall. 411; Genesee Chief, 12 How. 443; Jackson *v.* Magnolia, 20 How. 296; Stearns *v.* Trevor, 4 Wall. 555; Insurance Co. *v.* Dunham, 11 Wall. 1; The Belfast *v.* Boon, 74 U. S. 624; Keating *v.* Spink, 62 Am. Dec. 234, note.

[4] Rev. Stat. U. S., sec. 563, sub. 8; Keating *v.* Spink, 3 O. St. 105; 62 Am. Dec. 214.

[5] Robinson *v.* National Bank, 81 N. Y. 385; 12 Am. & Eng. Enc. of Law, 295.

[6] Taylor *v.* Hammons, 4 Wall. 411.

[7] *Post*, sec. 24.

Thus the constitution of California provides that the superior courts shall have jurisdiction in all criminal cases amounting to felony, and

States, and one of the states, and the guilty party may be prosecuted in the courts of either.[1]

18. Assistant jurisdiction.—Assistant jurisdiction is that which is exercised by a court of chancery in aid of a court of law by way of enforcing discovery, by the examination of witnesses *de bene esse*, or out of the jurisdiction of the court, by the perpetuation of the testimony of witnesses and the like.[2] It results from the inability of a court of law to exercise it. It belongs to that class of cases before referred to;[3] in which a party litigating a purely legal question, in a common law court, may call in the aid of a court of chancery to assist him in getting his case properly before the law court, and in enforcing his judgment when recovered. It is not, properly, concurrent jurisdiction, as the power to be exercised, and the object to be attained is different. The two courts exercise separate powers and functions, and the combined exercise of jurisdiction by both has a bearing upon and results in the final judgment, but the judgment is that of the law court alone. This assistant jurisdiction is of much less consequence at the present day than it was formerly, and for various reasons. In those states in which codes have been adopted, the distinction between common law and equity practice and procedure has been abolished, and courts of general jurisdiction exercise both common law and equity powers and functions, and may afford every

cases of misdemeanor *not otherwise provided for*. Const. Cal., art. 6, sec. 5. An act was passed creating a police judge's court, and giving it jurisdiction in certain misdemeanors. It was held that by this act the misdemeanors mentioned became "otherwise provided for," and that the jurisdiction in such cases was taken from the superior courts and vested exclusively in the police judge's courts. Green *v.* Superior Court, 78 Cal. 556; 21 Pac. Rep. 307, 541; Ex parte Wallingford, 60 Cal. 103; Gafford *v.* Bush, Id. 149.

[1] Cross *v.* State of North Carolina, 132 U. S. 131; 10 Sup. Ct. Rep. 47; People *v.* McDonnell, 80 Cal. 285; 22 Pac. Rep. 190.

[2] *Ante*, sec. 9; Bouv. Law Dic., title, Jurisdiction; 12 Am. & Eng. Enc. of Law, 251; Skinner *v.* Judson, 8 Conn. 528; 21 Am. Dec. 691; Hopkins *v.* United N. J. R. R. & Canal Co., 27 N. J. Eq. 286.

[3] *Ante*, sec. 17.

remedy that could formerly be given by both courts of law and equity. For this reason the aid of another court for any of the purposes above mentioned, is not needed, and assistant jurisdiction is entirely unknown. Besides, not only in the code states, but in others, parties are now made competent witnesses, and provision is made, usually, for taking their testimony, before or at the trial of the cause, which renders a discovery unnecessary.[1] So with reference to the production of documents. It was within the power of a court of equity to compel the production of documents, as an exercise of its right to enforce a discovery, for the inspection and use of the opposite party.[2] Now, a much more simple mode of compelling such production is provided by statute. This is usually done by a mere motion in the court in which the action is pending, supported by the proper affidavit, or by a *subpena duces tecum*.[3]

Similar provisions for the perpetuation of testimony, without the interposition of either court or judge, are sometimes made. And in some of the states a party to the action may, under an order of the court, be examined on written interrogatories before the trial.[4] And the testimony of witnesses, out of the jurisdiction of the court, may be taken by depositions, whether the witness be in this or a foreign country.

In some of the states provision is made for compelling discovery by the filing of interrogatories, in connection with a party's pleading, to be answered by the opposite party under oath.[5]

The statutory proceedings, known as proceedings supplementary to execution, have superseded, to a large ex-

[1] Brown *v.* Swann, 10 Pet. 497; Rioppelle *v.* Doeliner, 26 Mich. 102.

[2] Adams' Eq., p. 18.

[3] Rev. Stat. U. S., secs. 724, 869; Ex parte Boyd, 105 U. S. 647; Paton *v.* Majors, 46 Fed. Rep. 210; Union Pac. Ry. Co. *v.* Botsford, 141 U. S. 250; 11 Sup. Ct. Rep. 1000.

[4] Blossom *v.* Luddington, 32 Wis. 212.

[5] Jacksonville, etc., Ry. Co. *v.* Peninsular Land, etc., Co., 27 Fla. 157; 9 Sou. Rep. 661; Wilson *v.* Webber, 2 Gray, 558; 2 Work's Ind. Pr. & Pl., sec. 1233.

tent, the equitable jurisdiction afforded by the courts of chancery in aid of the enforcement of a common law judgment by the discovery of property subject to execution.[1] But while this jurisdiction has become of much less consequence than formerly, it still exists, and may be called into exercise in a proper case where the law and equity courts are still maintained as separate and distinct organizations.[2] But the essence of this jurisdiction is that it is in aid of the legal right of a party, and it will not be exercised where the law court is competent to grant the same relief.[3] Therefore it is held that where provision is made for proceedings supplementary, in a court of law, for the purpose of reaching property of a defendant subject to execution, a court of chancery will not entertain jurisdiction for the same purpose.[4]

[1] Ex parte Boyd, 105 U. S. 647.

[2] Adams' Eq. 1; Shotwell's Adm'x *v.* Smith, 20 N. J. Eq. 79.

In Shotwell's Adm'x *v.* Smith, *supra*, the chancellor said: "Courts of equity will always compel discovery in aid of prosecuting or defending suits at law, and to make such discovery of use on the trial at law, will restrain the suit from proceeding until the discovery is had. And this ancient and well settled jurisdiction is not taken away by the fact that courts of law have been clothed with powers to compel discovery in such cases by the oath of the complainant. Besides, the power given to courts of law is not so complete and ample as the power to compel discovery in chancery. At law, the plaintiff can not be compelled actually to answer; the only penalty is that the court may stop his proceeding in the suit. On this ground the complainant is entitled to maintain the injunctions until answers are put in."

[3] Story's Eq. Jur., sec. 1495; Ex parte Boyd, 105 U. S. 657; Gelston *v.* Hoyt, 1 Johns. Ch. 547; United States *v.* McLaughlin, 24 Fed. Rep. 825; Rindskoff *v.* Platto, 29 Fed. Rep. 130; Roippelle *v.* Doeliner, 26 Mich. 102.

[4] Thus, in Ex parte Boyd, 105 U. S. 657, the Supreme Court of the the United States said: "Now, it is of the essence of the jurisdiction of courts of equity, in bills of discovery merely, that it is in aid of the legal right; and it is a fundamental rule, prescribed for the exercise of that jurisdiction, in the words of Story (Eq. Jur., sec. 1495), that 'courts of equity will not entertain a bill for discovery to assist a suit in another court, if the latter is, of itself, competent to grant the same relief; for in such a case the proper exercise of the jurisdiction should be left to the functionaries of the court where the suit is depending.' It follows, then, that, although at one time courts of equity would entertain bills of discovery in aid of executions at law, because courts of law were not armed with adequate powers to execute their own process, yet the mo-

It will be seen that the decided cases are not in entire

ment those powers were sufficiently enlarged, by competent authority, to accomplish the same beneficial result, the jurisdiction in equity, if it did not cease as unwarranted, would, at least, become inoperative and obsolete. A bill in equity to compel disclosures from a plaintiff or a defendant, of matters of fact peculiarly within his knowledge, essential to the maintenance of the legal rights of either in a pending suit at law, would scarcely be resorted to, unless under special circumstances, now, when parties are competent witnesses, and can be compelled to answer, under oath, all relevant interrogatories properly exhibited; nor to compel the production of books, deeds, or other documents, important as instruments of evidence, when the court of law, in which the suit is pending, is authorized by summary proceedings to enforce the same right.

"But even conceding that such enlargements of the powers of courts of law do not deprive courts of equity of jurisdiction theretofore ercised, no one has ever supposed that they were illegitimate intrusions upon the exclusive domain of equity, or produced any confusion of boundaries between the two systems. No one has ever questioned the authority of congress to make parties to a suit competent witnesses, or to confer upon courts of law power to compel the production of books and papers, because discovery was an ancient head of equitable jurisdiction. It is the very office of the principle of equity to supply defects in the law, and it is not to be regarded as anomalous that the technical law should, in the course of its necessary development, incorporate into its own organization improvements in procedure, first introduced as equitable remedies. It is this very capacity of parallel growth that constitutes and perpetuates the harmonious co-existence of the two departments of our jurisprudence. Its history furnishes many examples and illustrations of this tendency and of its results. There is certainly nothing in the nature of an examination of a judgment debtor, upon the question as to his title to and possession of property applicable to the payment of a judgment against him, and of the fact and particulars of any disposition he may have made of it, which would render it inappropriate, as a proceeding at law, under the orders of the court, where the record of the judgment remains, and from which the execution issues. Such examinations are familiar features of every system of insolvent and bankrupt laws, the administration of which belongs to special tribunals, and forms no necessary part of the jurisdiction in equity. It is a mere matter of procedure, not involving the substance of any equitable right, and may be located, by legislative authority, to meet the requirements of judicial convenience. Whatever logical or historical distinctions separate the jurisdictions of equity and law, and with whatever effect those distinctions may be supposed to be recognized in the constitution, we are not of opinion that the proceeding in question partakes so exclusively of the nature of either that it may not be authorized, indifferently, as an instrument of justice in the hands of courts of whatever description."

harmony on this point.[1] Some go to the extent of holding that by these statutory provisions, which enable the law courts to render, in a different form, the same relief that could formerly be obtained only by resort to a court of equity, has rendered the assistant jurisdiction of a court of equity obsolete. And, whether the jurisdiction of courts of chancery has been taken away by these statutory provisions or not, the right to resort to such courts is so rarely exercised, at the present day, that it may well be said that, practically, the jurisdiction has become obsolete. But, as we have seen, some of the equity courts hold that the jurisdiction still exists in such courts, that the powers given to the law courts are not as adequate and effectual as the equity jurisdiction and the means by which the powers of courts of chancery are exercised and enforced.[2] But, where the powers given to common-law courts are adequate, there can be no doubt that the exercise of its jurisdiction by a court of chancery would be an unwarranted interference.[3]

[1] Jacksonville, etc., Ry. Co. *v.* Peninsular Land, etc., Co., 27 Fla. 157; 9 Sou. Rep. 665; Adams Eq., 8th ed., 1, note.

[2] Shotwell's Adm'x. *v.* Smith, 20 N. J. Eq. 79; Cannon *v.* McNab, 48 Ala. 688; Buckner *v.* Ferguson, 44 Miss. 667; Millsaps *v.* Pfriffer, Id. 805; Kearney *v.* Jeffries, 48 Miss. 343.

[3] Brown *v.* Swann, 10 Pet. 497: Ex parte Boyd, 105 U. S. 647; United States *v.* McLaughlin, 24 Fed. Rep. 823; Rindskopf *v.* Platto, 29 Fed. Rep. 130; Riopelle *v.* Doeliner, 26 Mich. 102.

In Brown *v.* Swann, 10 Pet. 497, 501, it was said: "When the legislature of Virginia passed the statute, it fixed the nature and extent of the jurisdiction of a court of equity to compel a discovery, upon oath, from an interested party, in a suit either in law or in equity, and the rules which equity had prescribed to itself to enforce its jurisdiction in this regard. It knew the distinction between a bill for such discovery and other bills in chancery, which are also bills for discovery. One of the former is a bill for the discovery of facts alleged to exist only in the knowledge of a person, a party to a private transaction with the person seeking the disclosure; essential to the establishment of a just right in the latter, and which would be defeated without such disclosure. In other words, it is a bill to discover facts which can not be proved according to the existing forms of procedure at law. The jurisdiction of a court of equity, in this regard, rests upon the inability of the courts of common law to obtain, or to compel, such testimony to be given. It has no other foundation; and whenever a discovery of this kind is sought in equity, if it shall appear that the same facts could be obtained

So it may safely be said that where a statute provides a means by which a common-law court may bring about a discovery, by the examination of witnesses or otherwise, it is not only unnecessary, but inexpedient and unsafe, to resort to a court of equity for the purpose.[1]

by the process of the courts of common law, it is an abuse of the powers of chancery to interfere. The courts of common law having full power to compel the attendance of witnesses, it follows that the aid of equity can alone be wanted for a discovery in those cases where there is no witness, to prove what is sought from the conscience of an interested party. Courts of chancery have then established rules for the exercise of this jurisdiction, to keep it within its proper limits, and to prevent it from encroaching upon the jurisdiction of the courts of common law.

"The rule to be applied to a bill seeking a discovery from an interested party is that the complainant shall charge in his bill that the facts are known to the defendant, and ought to be disclosed by him, and that the complainant is unable to prove them by other testimony; and, when the facts are desired to assist a court of law in the progress of a cause, it should be affirmatively stated in the bill that they are wanted for such purpose. Such is the rule in Virginia, as may be seen in Duval *v.* Ross, 2 Mun. 290, and in Bass *v.* Bass, 4 Hen. & Mun. 478; and it will be applied to the construction of the third section of the statute against usury, upon the authority of her own courts.

"Many other authorities to the same purpose might be cited from English and American reports. Unless such averments are required, is it not obvious that the boundaries between the chancery and common-law courts would be broken down, and that chancellors would find themselves, under bills for a discovery from an interested party, engaged in the settlement of controversies, by evidence *aliunde*, which the common-law courts could have procured, under the process of a subpena, in delaying proceedings at law, by pretenses that a discovery is wanted, for the sake of justice, and in enjoining judgments, upon indefinite allegations of the plaintiff having a knowledge of facts which gave to a defendant an equity to be released; though the defendant might have availed himself of the evidence of third persons to establish the same facts, in the progress of the cause, or of the powers of chancery to procure them, by a discovery, to assist the court in deciding it, which last is the case now under consideration?"

[1] "It is very doubtful whether a pure bill of discovery in an equity suit would lie at the present day. It may be that a discovery might be asked for in a bill for relief; but it is probable that no prudent counsel, understanding what must be the effect, would at this day file a pure bill of discovery, or call for a discovery in a bill for relief, and thus unnecessarily give the defendant an advantage which he would not otherwise have under our present practice, which enables a complainant to place the defendant upon the stand and examine him as a witness, and

As to the necessity of showing affirmatively, in a bill for discovery, that a party can not establish his defense at law by the testimony of witnesses, or without the aid he seeks, a distinction is made between a bill for discovery purely and one for discovery and relief, it being asserted that in the former no such showing is necessary.[1] But this distinction does not seem to be maintained by the later decisions.

The fact that a court of equity may, by reason of its jurisdiction to compel a discovery, draw to itself the power to grant relief as well, is not overlooked.[2] But we are now considering the assistant jurisdiction of courts of equity which does not include their right to grant the same relief in the action that might be granted by a court of law or to afford relief by final decree, although of a different kind from that which a court of law might render.[3]

It must not be supposed from the fact that the jurisdiction in equity to obtain a discovery has been superseded by statutory provisions relating to the subject, that all the learning on the subject has ceased to be useful. The statutory remedies provided are regulated very considerably by the old equity principles. For example, where an attempt is made to compel answers to interrogatories under statutes providing therefor, the question as to what are proper interrogatories, how far a party can be required to answer where it is claimed his answers will criminate him, and many other matters connected with the subject relating, not only to interrogatories, but to the production of documents, perpetuation of testimony, and other matters

thereby obtain his testimony much more judiciously—testimony of a character less prejudicial to his client's interests than it would be were the testimony to come in the form of a sworn answer, strained through the legal collender of his counsel, and by him shaped and shaded in his office at his leisure." Sawyer, J., in United States *v.* McLaughlin, 24 Fed. Rep. 825.

[1] Story's Eq. Pl., sec. 319, note.

[2] Hopkins *v.* United N. J. R. R. & Canal Co., 27 N. J. Eq. 286.

[3] 1 Pomeroy's Eq. Jur. 101.

of former equitable cognizance, are still governed by equitable principles.[1]

19. Terms of court as affecting jurisdiction.—In attempting to ascertain what was necessary to constitute a court, we have seen that in order to properly and legally perform the functions and exercise the jurisdiction of a court, the judge or judges must be in the discharge of judicial duties at the time and at the place prescribed by law for the sitting of the court.[2] The times and places at which courts shall sit are usually fixed by statute, and in order that a court may exercise its jurisdiction, these statutory provisions must be observed. The proceedings of a court at a time or place other than that prescribed by law are *coram non judice*, and, therefore, void.[3] It is not only void; it is not the act of a court at all.[4] Parties can not stipulate for the trial of a cause out of term time, and thus render the acts of the judge or judges valid as the acts of a court.[5] It is sometimes difficult to determine whether an act to be done is one which may be performed by the judge, or whether it is one for the court. Acts which are within the powers of a judge need not be done in term, and in open court, but may be done at chambers or elsewhere, at any time when business may be legally done. But where the act is required to be done by the court, it can not be done by the judge of the court in vacation unless

[1] Jacksonville, etc., Ry. Co. *v.* Peninsular Land, etc. Ry. Co., 27 Fla. 157; 9 Sou. Rep. 661; Blennerhassett *v.* Stephens, 58 Hun. 611; 12 N. Y. Sup. 602.

[2] *Ante*, sec. 1; Hobart *v.* Hobart, 45 Ia. 501, 503; Bouv. Law Dic. title, Courts; Anderson's Dic. of Law. 274; Brumley *v.* The State, 20 Ark. 77.

[3] Brumley *v.* The State, 20 Ark. 77; Norwood *v.* Kenfield, 34 Cal. 329; Wicks *v.* Ludwig, 9 Cal. 173; McCool *v.* The State, 7 Ind. 378; Cain *v.* Goda, 84 Ind. 209; Galusha *v.* Butterfield, 2 Scam. (Ill.) 227; Freeman on Judg., sec. 121; 1 Black on Judg., secs. 179, 180; Osborn Ex parte, 24 Ark. 479; Francis *v.* Wells, 4 Colo. 274; Grable *v.* The State, 2 G. Greene (Ia.), 559. But see on this point, State *v.* Payton, 32 Mo. App. 522.

[4] *Ante*, sec. 1; Wicks *v.* Ludwig, 9 Cal. 173; Francis *v.* Wells, 4 Colo. 274; Freeman on Judg., sec. 121.

[5] Wicks *v.* Ludwig, 9 Cal. 173; Bates *v.* Gage, 40 Cal. 183.

the power is expressly conferred upon him by law.[1] A judge can not fix terms of court; this must be done by law.[2] But such power may be conferred upon the judges by statute.[3] The term "vacation" is usually understood to mean the interim between terms of court, from the final adjournment of one term to the commencement of another.[4] But it has been held that where a term is adjourned to a subsequent day, the time intervening is a vacation.[3] Provision is frequently made for the adjournment of terms of court and the holding of special terms. When special terms are provided for, notice of the time and place of holding the same is usually required. And in order to give the court jurisdiction to act at such times, the requirements of the law must be complied with.[5] Where a court might, under certain contingencies, provided by law, be legally in session at a certain time, without notice or other action on its part, it will be presumed, in the absence of any showing to the contrary, that it was legally in session.[6] As a general rule a court can not legally transact business on Sunday. But there are exceptions to this rule. It has been held, for example, that the verdict of a jury may be received on Sunday.[7] But in some of the cases it is strongly held to the contrary.[8] It has been held that a court may reinstruct a jury on Sunday in case of a disagreement.[9]

[1] Ferger *v.* Wesler, 35 Ind. 53; Conkling *v.* Ridgley, 112 Ill. 36; Newman *v.* Hammond, 46 Ind. 119.

[2] Batten *v.* The State, 80 Ind. 394; Doss *v.* Waggoner, 3 Tex. 515.

[3] Conkling *v.* Ridgley, 112 Ill. 36. [4] Anderson's Dic. of Law, 1079.

[5] Dunn *v.* The State, 2 Ark. 229; 35 Am. Dec. 54; Orman *v.* Riley, 16 Cal. 186.

[6] State *v.* Penley, 107 N. C. 808; 12 S. E. Rep. 455.

[7] State *v.* Penley, 107 N. C. 808; 12 S. E. Rep. 455; Corey *v.* Silcox, 5 Ind. 370; Rosser *v.* McColley, 9 Ind. 587; McCorkle *v.* The State, 14 Ind. 39.

[8] Davis *v.* Fish, 1 G. Greene (Ia.) 406; 48 Am. Dec. 387.

[9] Jones *v.* Johnson, 61 Ind. 257.

In some of the states the question has been set at rest by statutory provisions. For example, in California it is provided that no court shall be open, or any judicial business be transacted on Sunday and certain legal holidays, except for the following purposes:

At common law Sunday was a day upon which no judicial act could be done,[1] and in the absence of any statute this rule is generally adhered to. To avoid this well settled principle, the cases in which it is held that a verdict may be received on Sunday usually hold that it is not a judicial act. But it is a part of the trial of a cause, and is clearly judicial in its nature. There is really no very satisfactory principle upon which these decisions can be justified. It is better to say that they have abandoned the common law rule on the subject more as a matter of convenience than any thing else. This change has not extended to the rendition of judgments. It is still held that a judgment can not be rendered on Sunday.[2]

"1. To give, upon their request, instructions to a jury when deliberating on their verdict.

"2. To receive a verdict or discharge a jury.

"3. For the exercise of the powers of a magistrate in a criminal action, or in a proceeding of a criminal nature; provided that the supreme court shall always be open for the transaction of business; and provided further, that injunctions and writs of prohibition may be issued and served on any day."

Code Civ. Pro. Cal., sec. 134. See also Code Civ. Pro. N. Y., sec. 6; An. Stat. Neb., 1881, p. 344, sec. 59.

In a note to Coleman *v.* Henderson, 12 Am. Dec. 290, 291, it is said: "That a verdict may be received on Sunday seems now to be settled. Van Riper *v.* Van Riper, 7 Am. Dec. 576; True *v.* Plumley, 36 Me. 466; Cory *v.* Silcox, 5 Ind. 370; Rosser *v.* McGolley, 9 Id. 587; McCorkle *v.* State, 14 Id. 39; Hoghtaling *v.* Osborn, 15 Johns. 119; Webber *v.* Merrill, 34 N. H. 202; State *v.* Ricketts, 74 N. C. 187; Huidekoper *v.* Cotton, 3 Watts, 56; Reid *v.* State, 53 Ala. 402. The reason assigned for the validity of such a verdict by some of the cases is that the rendition and receiving is a work of necessity, and by others that it is merely a ministerial act, and not within the prohibition relating to judicial acts on Sunday. The conditions upon which a verdict rendered on Sunday will be deemed valid, are well expressed in the elaborate opinion of Judge Manning, in Reid *v.* State. He says: 'We are of opinion that when a jury, to whom a cause has been committed on a Saturday or other secular day of the week, are lawfully kept together under charge of officers of court, and are ready on Sunday to deliver in their verdict, it is lawful for the judge then to meet them with the other officers of court to receive it, and thereupon discharge the jury and adjourn the court until the next day.'"

[1] Chapman *v.* The State, 5 Blkf. (Ind.) 111.

[2] Chapman *v.* The State, 5 Blkf. (Ind.) 111; Allen *v.* Godfrey, 44 N. Y. 433.

During the term provided by law, the court may regulate the time of its sittings and adjournments, from one day to any succeeding day of the term, or reconvene the court on the same day after an adjournment to the following day.[1] And the failure of the court to appear, for one day, during the term, and during the trial of a cause, does not render its subsequent proceedings, commenced on the following day, void.[2] But with the final adjournment the court not only ceases to be a court for that term, but it thereby loses all control over its judgments and decrees rendered during the term, unless its jurisdiction is saved by some proper proceeding instituted within the time allowed by law.[3]

A premature adjournment for the term, by a sheriff who is authorized to adjourn the same at a certain time if the judge does not appear, does not affect the right of the judge to open and hold the court for the balance of the term.[4]

It is held in some of the states that a valid judgment may be rendered during vacation, and entered as of the preceding or ensuing term.[5] But the weight of authority and reason is against this proposition.[6] The doctrine that

[1] Stefani *v.* The State, 124 Ind. 3; 24 N. E. Rep. 254; Martina *v.* The State, 105 Ind. 445; 5 N. E. Rep. 20; Bowen *v.* Stewart, 128 Ind. 507; 26 N. E. Rep. 168.

[2] People *v.* Sullivan, 115 N. Y. 185; 21 N. E. Rep. 1039.

[3] Daniels *v.* Daniels, 12 Nev. 118; Johnson *v.* Pacific Cement Co., 50 Cal. 648.

[4] Thomas *v.* Fogarly, 19 Cal. 644; People *v.* Shainwold, 51 Cal. 468.

[5] 1 Black on Judg., sec. 179, citing: King *v.* Green, 2 Stew. 133; 19 Am. Dec. 46; Hervey *v.* Edmunds, 68 N. Car. 243; New Orleans *v.* Gauthreaux, 32 La. Ann. 1126; Green *v.* Reagan, 32 La. Ann. 974. See also, Ex parte Bennett, 44 Cal. 84; Roy *v.* Horsley, 6 Or. 382; 25 Am. Rep. 537.

[6] Puget Sound Agri. Co. *v.* Pierce County, 1 Wash. Ter. 75; Earl *v.* Earl, 27 Kan. 538; Bates *v.* Gage, 40 Cal. 183; Norwood *v.* Kenfield, 34 Cal. 329; Roy *v.* Horsley, 6 Ore. 382; 25 Am. Rep. 539, note; Cooley's Const. Lim. *p. 399; Francis *v.* Wells, 4 Colo. 274; Filley *v.* Cody, 4 Colo. 109; Kirtley *v.* Marshall Silver M'g Co., 4 Colo. 111; Kinports *v.* Rawson, 29 W. Va. 487; 2 S. E. Rep. 85; Wells' Jur., secs. 132–139.

Mr. Freeman, in his work on Judgments, says: "If the statute requires regular terms to be held for the trial of causes, the court, in the

such a proceeding can be rendered valid by the mere consent of parties, is certainly not in harmony with well settled legal principles. If, as is almost, if not quite uniformly held, a judgment or decree rendered in vacation is not the action of a court, and is a nullity, it is difficult to see how it can be rendered valid by mere consent. And further, it would seem to be in direct conflict with the well settled principle that jurisdiction can only be exercised by a court, and can not be conferred upon any other person or body by the consent of parties.[1]

Some of the cases referred to as holding that a judgment may be entered in vacation, by consent, are founded upon code provisions to the effect that a defendant may submit to a judgment in vacation by an agreement in writing, or otherwise.[2] Others of the decisions can not be accounted for in this way.

Where it is provided that causes may be heard at a special term with the consent of parties, such consent is necessary to give the court jurisdiction.[3]

The question sometimes arises whether, where the trial of an action is commenced during the term, but can not be completed before its close, the court has power to continue the hearing beyond the term fixed by law. On this question the authorities are conflicting. In some cases it is held that the court has no such power, and that its functions as a court cease with the close of the term.[4] In others, it is held that where the case is entered upon with the *bona fide* expectation and belief that it will be con-

intervals between those terms is, for the purpose of conducting trials, in the same condition as though its authority over the case were entirely withdrawn. It is no longer a court. *Judicial powers can not be conferred upon it by consent of the parties*; and any judgment rendered upon a trial had in pursuance of such consent is void, and is so wanting in even the color of judicial authority that it will not be reversed upon appeal." Freeman's Judg., sec. 121.

[1] *Ante* secs. 1, 10, 12.

[2] Code, Iowa, 1851, secs. 1821, 1822; Hattenback *v.* Haskins, 12 Ia. 109; O'Hagen *v.* O'Hagen, 14 Ia. 264; Townsley *v.* Morehead, 9 Ia. 565.

[3] Fowler *v.* Mosher, 85 Va. 421; 7 S. E. Rep. 542.

[4] Davis *v.* Fish, 1 G. Greene (Ia.) 406; 48 Am. Dec. 387.

cluded before the close of the term, the trial may be completed after the term has closed, where the judge is only directed and not imperatively required by law to hold court during the time in another county.[1] In some of the states provision is made for an emergency of this kind by statute.[2]

Independent of such a statutory provision, it is not easy to see upon what principle it can properly be held that a term of court, fixed by law, can be extended by the act of the court in commencing the trial of a cause.

A term of court, as fixed by law, can not be abridged by an adjournment of the court before the term expires. So where it is provided that the terms of court in one county shall commence immediately upon the close of the terms of court in another county in the district, the court can not legally adjourn the term in the first county and take up the business of the other county before the expiration of the first term as fixed by law. The adjournment does not shorten the term, it only stops the business.[3]

A judgment rendered during the term may be entered in vacation.[4] And sometimes the prothonotary of the court is authorized to sign judgments or to enter them in vacation.[5] But where the entries of judgments are required to be read and signed in open court, by the judge, a judgment entered by the clerk after the close of the term is void, although the judge may have signed the

[1] The State *v.* Knight, 19 Ia. 98; Van Riper *v.* Van Riper, 1 South (N. J.) 156; 7 Am. Dec. 576; Bryceland *v.* Commonwealth, 74 Pa. St. 467; Johnson *v.* Pacific Cement Co., 50 Cal. 648.

[2] In Indiana it is provided by statute that "whenever a trial is begun and in progress at the time when, by law, the term of such court would expire, the term shall be extended until the close of such trial." Rev. Stat. Ind., 1881, sec. 1349; Elliott's Supp. Ind. Stat., sec. 284; Addington *v.* Wilson, 5 Ind. 137; 61 Am. Dec. 81; 1 Rev. Stat. Ohio, 1886, secs. 453, 470; Dorsch *v.* Rosenthal, 39 Ind. 209; Wayne Pike Co. *v.* Hammons, 27 N. E. Rep. 487.

[3] Batten *v.* The State, 80 Ind. 394.

[4] Sieber *v.* Frink, 7 Colo. 148; 2 Pac. Rep. 901; Board of Supervisors *v.* Sullivan, 51 Wis. 115; 8 N. W. Rep. 12.

[5] Beyerle *v.* Hain, 61 Pa. St. 226; Board of Supervisors *v.* Sullivan, 51 Wis. 115; 8 N. W. Rep. 12.

record in blank, with direction to the clerk to fill in the judgment over his signature.[1]

In order to constitute a legal term of court, the same must be convened at the time provided by law.[2] But provision is usually made for the opening and adjournment of the court from day to day by some officer, either the clerk or sheriff, until the appearance of the judge.[3] If the court is not opened, and the term can not be held, the business goes over, without any action on the part of the court or parties, until the next term in course, or the next special term, if one is provided for.[4]

When the court is once opened, the presence of the judge is necessary at all times when judicial business is being transacted.[5] And where a certain number of judges is required to transact business, the presence of any of their number can not be dispensed with.[6] But the fact that one of the judges, necessary to constitute the court, is called as a witness in the cause on trial, and temporarily leaves the bench and takes the witness stand for that purpose, does not affect the jurisdiction of the court.[7]

It is held in New York, that where three judges are necessary to constitute a court, and a judge who did not hear the argument is not allowed to participate in the decision, that such judge may, nevertheless, sit at the time of the decision, in order to constitute a court, and a decision by the two judges who heard the argument, is valid.[8]

20. SPECIAL AND INFERIOR JURISDICTION HOW OBTAINED AND EXERCISED.—Courts are frequently vested with inferior or special jurisdiction only, or courts of general and superior jurisdiction are given jurisdiction in special or particular cases, to be exercised to the extent and in the manner

[1] Passwater *v.* Edwards, 44 Ind. 343; State *v.* Thistlethwaite, 83 Ind. 317; Mitchell *v.* St. John, 98 Ind. 598.

[2] People *v.* Sanchez, 24 Cal. 17; The State *v.* Roberts, 8 Nev. 239.

[3] People *v.* Sanchez, 24 Cal. 17. [4] Whitman *v.* Fisher, 74 Ill. 147.

[5] Meredeth *v.* The People, 84 Ill. 479.

[6] Blend *v.* The People, 41 N. Y. 644.

[7] People *v.* Dohring, 59 N. Y. 374; 17 Am. Rep. 349.

[8] Corning *v.* Slosson, 16 N. Y. 294.

specially provided by statute. These courts of inferior or special jurisdiction are said to act by virtue of the statute, and to be controlled by it, as contradistinguished from courts which proceed according to the course of the common law.[1]

A court of general jurisdiction, and which, in the ordinary exercise of its jurisdiction does proceed according to the course of the common law, may have conferred upon it statutory jurisdiction, as, for example, in case of attachment, garnishment, and other similar proceedings which were unknown to the common law.[2]

Where the statute provides for the manner of acquiring jurisdiction, and the mode of proceeding thereafter, in this class of courts and cases, the provisions of the statute must be followed or the court will be without authority to act.[3] And the proceedings must show upon their face that jurisdiction has been obtained, and the power delegated by the statute has been exercised in the appointed mode.[4] But in construing the records of such tribunals, acting within the scope of their authority, in ascertaining whether they have followed the statutory requirements, technical precision is not required. It is enough, if, taking the whole transcript of the proceedings, giving it a reasonable construction, it appear, though informally, that

[1] *Ante*, sec. 7; Cox *v.* Groshong, 1 Pinney (Wis.), 307; Galpin *v.* Page, 85 U. S. 350.

[2] Gunn *v.* Howell, 27 Ala. 663; 62 Am. Dec. 785; Chollar Mining Co. *v.* Wilson, 66 Cal. 374; 5 Pac. Rep. 670.

[3] Grimes' Estate *v.* Norris, 6 Cal. 621, 625; 65 Am. Dec. 545; Mulligan *v.* Smith, 59 Cal. 206, 228; In re Grove Street, 61 Cal. 438; Cox *v.* Groshong, 1 Pinney (Wis.), 307; The State *v.* Hoelz, 69 Wis. 84, 88; 33 N. W. Rep. 597; Mossman *v.* Forrest, 27 Ind. 233; The State *v.* Gachenheimer, 30 Ind. 63; The Dayton, etc., R. R. Co. *v.* Marshall, 11 Ohio St. 497; English *v.* Smock, 34 Ind. 115; 7 Am. Rep. 215; Chollar Mining Co. *v.* Wilson, 66 Cal. 374; 5 Pac. Rep. 670; Williams *v.* Barnaman, 28 How. Prac. 59, 65; Root *v.* McFerrin, 37 Miss. 17; 75 Am. Dec. 49.

[4] *Post*, sec. 25; Central Pacific R. R. Co. *v.* Pearson, 35 Cal. 247, 257; Rosenthal *v.* The Madison, etc., Plankroad Co., 10 Ind. 358; Rhode *v.* Davis, 2 Ind. 53; Straughan *v.* Inge, 5 Ind. 159; Cobb *v.* The State, 27 Ind. 134; Root *v.* McFerrin, 37 Miss. 17; 75 Am. Dec. 49; Horton *v.* Elliott, 90 Ala. 480; 8 Sou. Rep. 103.

the statutory requisites have been complied with.[1] The disposition of the courts is to uphold the jurisdiction of inferior courts whenever it can be done, and, therefore, great liberality has been shown in construing the transcripts of their proceedings when brought collaterally in question.[2] Where certain steps are required to be taken, as the foundation of the proceeding, as, for example, the filing of a petition containing certain facts, or signed by certain persons, the giving of bond, or the like, such steps are jurisdictional, and must be taken, or the proceeding will be void. Being jurisdictional, they can not be supplied by waiver or consent.[3] But the rule that defects can not be supplied by consent, or the party be estopped by a failure to make the necessary objections at the proper time, is only applicable to matters affecting the public or jurisdiction of the subject-matter. A party to the action may waive personal notice upon himself in the matter of a special statutory proceeding, or in a court having only a limited or special jurisdiction, as well as in any other. But where some proceeding is required affecting the public, for example, where notice, not to any individual, but to all persons, is required, no one person or any number of persons, can give jurisdiction to the court or other tribunal by consenting that such proceeding may be omitted, or by an appearance or other act of submission to the authority of such tribunal.[4]

[1] Lewis *v.* Laylin, 46 Ohio St. 663; 23 N. E. Rep. 288.

[2] McClelland *v.* Miller, 28 Ohio St. 498.

[3] Ruhland *v.* Supervisors, 55 Wis. 664, 668; 13 N. W. Rep. 877; Fleming *v.* Hight, 101 Ind. 466, 470.

[4] Ruhland *v.* Supervisors, 55 Wis. 668; 13 N. W. Rep. 877; Steen *v.* Norton, 44 Wis. 412.

In Ruhland *v.* Supervisors, 55 Wis. 668; 13 N. W. Rep. 877, the court said: "It seems to us very clear that these decisions settle the question beyond dispute, in this court, that the supervisors can only acquire jurisdiction of the proceeding to lay out a highway by a strict compliance with the statutory direction, and that no consent of the applicants for the highway, or the persons through whose lands the highway is laid out, can validate the proceedings, if the board has failed to comply with such statutory requirements. A land owner through whose land the highway runs, may, by express agreement, waive his right to compensation

It is sometimes difficult to determine whether a certain step required to be taken is one affecting the person of a defendant or the subject-matter. Usually the question can be determined by the test whether or not the proceeding called for is necessary to give the court jurisdiction to act upon property or other subject-matter in controversy, or merely to bring a certain interested party into court to answer as to his rights or interest in the subject-matter. If the proceeding is only necessary to bring a party before the court, he may undoubtedly waive such proceeding by voluntarily coming into court and submitting himself to its jurisdiction, or by expressly consenting to the omission of such proceeding. But this can not be done where the proceeding is one to reach the property or other subject-matter.[1]

for the land taken for the highway, and he may, undoubtedly, by express stipulation, waive his right to personal notice of the time and place of the meeting of the board to decide upon the petition, because these things are matters which are personal to him, and do not affect the interest of the public generally. But that a land owner can not waive any step prescribed by the statute in which the public generally is interested, is, we think, conclusively settled by the cases of Roehrborn *v.* Schmidt and Damp *v.* Town of Dane, *supra*. In the first case it was held that the land owner, who appeared before the supervisors at the time fixed for the hearing of the petition, and objected to the laying out of the highway, did not waive the right to question the jurisdiction of the board to proceed, for the reason that the public notice required by the statute had not been posted as required by law; and in the second case it was held that the appearance of the town before the board was no waiver of its right to question the jurisdiction of the authorities assuming to lay out such highway on the ground that no proper petition had ever been presented to them."

[1] *Ante*, sec. 12; Steen *v.* Norton, 45 Wis. 412; Herrick *v.* The Racine Warehouse, etc., Co., 43 Wis. 93; Williams *v.* Barnaman, 28 How. Pr. 59, 65; Noyes *v.* Canada, 30 Fed. Rep. 665.

The case of Steen *v.* Norton, 45 Wis. 412, 414, was a proceeding in garnishment before a justice of the peace. The question was whether a defect in the affidavit of garnishment was supplied, or waived, by the voluntary appearance of the defendant. In ruling upon the question, the court say: "It is said above that the plaintiff in the principal suit may resort to this extraordinary remedy at his own will; but this is true only *sub modo*. It is not the policy of the statute to place this anomalous action, like ordinary actions, at the mere discretion of the plaintiff, or to give justices of the peace unqualified jurisdiction of it,

Where a court is vested by statute with power and authority to do certain acts, as for example to order a sale of property of the estate of a deceased person, but under certain limitations or restrictions, it must appear that the facts necessary to bring the particular case within the lim-

as in ordinary actions, where every person can become a plaintiff, have process, and put the justice's jurisdiction in motion, on demand. The plaintiff in garnishee proceedings, as in attachment as mesne process, replevin, and the like, can put in motion the jurisdiction of the justice, only by complying with statutory prerequisites. And the justice takes jurisdiction of the proceeding only upon the plaintiff's compliance with the preliminaries which the statute makes the condition of jurisdiction. In order to entitle a plaintiff to have recourse to the process of garnishment, in order to confer on the justice jurisdiction to entertain it, he must first make the affidavit required by the statute. He may institute his suit against his own debtor, of his own mere will, without condition precedent, and the justice takes jurisdiction of it by the mere fact of its institution. So he may institute a suit against his debtor's debtor, of his own mere will, without condition precedent, and the justice will take jurisdiction by the mere fact of its institution. But in that case the plaintiff can recover against the defendant in his own right only, not in the right of his debtor, not as a garnishee. He can take the right to sue his debtor's debtor as garnishee, and the justice can take jurisdiction of the proceeding only by force of the statutory affidavit. The affidavit is therefore the foundation, an essential condition, of the jurisdiction of the justice over the anomalous statutory proceeding; the statute making the extraordinary jurisdiction expressly dependent on the affidavit. Failure of the affidavit is therefore failure of jurisdiction over the subject-matter. The justice's jurisdiction of the proceeding is conditional, not absolute, and remains dormant until the affidavit supplies the condition. Without the affidavit, the proceeding could be no more than a personal action of the plaintiff, in his own right, against the garnishee. . . . It is quite certain that the officer takes no authority to summon the garnishee, without the statutory affidavit. And his summons without the affidavit can not operate to fix the garnishee's liability to the plaintiff. In that case, the garnishee may discharge his liability to his own creditor. And the assumption of jurisdiction by the justice, or the submission of the garnishee to his jurisdiction, can not cure want or material defect of the affidavit, or absolve the garnishee from liability to his own creditor, or fix his liability to his creditor's creditor, which the statute determines and makes wholly dependent upon service of the summons, founded on the statutory affidavit. All the subsequent proceedings of garnishment rest upon the liability of the garnishee to the plaintiff, the change of his creditors, the substitution of a stranger for his own creditor, by operation of law, upon the service of the summons which the officer

itations or restrictions prescribed actually existed, or the action of the court will be without authority.[1]

takes authority to issue and serve by force of the statutory affidavit only; mere waste paper in the absence of the proper affidavit. Without the affidavit, the officer is not acting within the scope of his office in summoning the garnishee. And, when he makes his return, the jurisdiction of the justice of the proceeding of garnishment rests wholly upon the effect of the statutory affidavit and summons, in subrogating—so to speak—the plaintiff for the garnishee's creditor; in other words, upon the sufficiency of the affidavit to charge the garnishee with liability to the plaintiff. If that be materially defective, the justice's want of jurisdiction over the subject-matter is apparent on the face of the affidavit. And the affidavit, taken as a complaint, discloses no cause of action against the garnishee, no ground of jurisdiction of the proceeding; being defective in a material averment, not cured by verdict or judgment.

"Even in courts of justices of the peace, voluntary appearance and submission, without objection, under void process, will cure the justice's defect of jurisdiction over the person of the defendant; but it can go no further. It can not operate to give the justice jurisdiction of a proceeding which he could not take without such appearance and submission. His jurisdiction of the subject-matter must come by statute; and if the statute makes his jurisdiction of the subject-matter dependent on preliminaries or conditions precedent, the justice can take jurisdiction only by force of the statutory preliminaries or conditions precedent. This is well exemplified by the writ of attachment, as mesne process. If the affidavit on which the attachment issues be materially defective, the defendant is entitled to have the action commenced by it dismissed *in toto*. But, if the defendant appear and submit without objection, he cures the defect of the process as a personal summons, but not as an attachment of property. The justice takes jurisdiction to render personal judgment against him, but not against the property attached."

[1] "It is sometimes said that a purchaser at administrator's sale is not bound to look beyond the judgment of a court of competent jurisdiction; and it is often said that an order of sale and a sale under the order are effectual to pass the title to the purchaser; but it is always understood that the jurisdiction of the court has been rightfully called into exercise, and that the order of sale is a valid order. If letters of administration were granted upon the estate of a living man because he had been committed to the penitentiary for twelve months, and the record showed the fact, it could never be held that an order of sale of his land, and a sale in conformity with the order, and a formal decree of confirmation, would pass the title to the purchaser. And why not? Here would be a judgment of a court of competent jurisdiction. Here would be an order of sale and a sale under it; but the whole would be a nullity, because the jurisdiction of the court was never rightfully called into exercise; or, in other words, because the facts did not exist

When jurisdiction has been properly acquired it must be exercised, throughout, in conformity to the requirements of the statute.[1] But if a tribunal is given discretionary powers no other court can interfere with its proceedings so long as it is acting within its statutory powers, in the manner provided by law, and in good faith, on the ground that such discretion is not being wisely exercised or will result injuriously. The discretion conferred upon a court of limited jurisdiction is no more the subject of control by another court than is the same power vested in a court of superior jurisdiction, so long as the court is acting within the powers and in the mode provided by statute.[2]

The right to set aside final judgments is not an incident to the ordinary jurisdiction of courts of inferior jurisdiction, and can not be exercised unless expressly authorized.[3] And where the power to vacate or set aside a

which authorized the court to grant letters of administration and make the order of sale. There exists in the minds of some a loose idea that because the court has jurisdiction to order the sale of land, its jurisdiction is exercised whenever it orders a sale; and it it is said that if a court determines any question of fact necessary to support its jurisdiction, its determination or judgment can never be collaterally impeached. This can not be universally true, because in the case of an administration upon the estate of a living man, the court necessarily determines that the man is dead, and yet the man may be shown to have been alive at the time of the judgment; and in such case, although every step in the proceedings by which the man's estate is sold may have been taken with the most perfect regularity, and although the purchaser buys in good faith, no title passes or can pass. This shows that the court only exercises its jurisdiction when the facts exist which authorize it to do the thing in question. And the question whether the jurisdiction of a court has been exercised or not is solved by ascertaining whether or not the facts existed which authorized the court to act as it did act." Withers *v.* Patterson, 27 Tex., 491; 86 Am. Dec. 643, 647; Martin *v.* Williams, 42 Miss. 210; 97 Am. Dec. 456, 461.

[1] Ruhland *v.* Supervisors, 55 Wis. 664; 13 N. W. Rep. 877; State *v.* Castle, 44 Wis. 670; White *v.* Conover, 5 Blkf. (Ind.) 462; Brown *v.* Kellogg, 17 Wis. 475; Crandall *v.* Bacon, 20 Wis. 639; 91 Am. Dec. 451; Matter of Valentine 72 N. Y. 184, 187.

[2] English *v.* Smock, 34 Ind. 115, 119; 7 Am. Rep. 215.

[3] Doctor *v.* Hartman, 74 Ind. 221, 225; Foist *v.* Coppin, 35 Ind. 473; Brown *v.* Goble, 97 Ind. 86.

judgment is given, and the mode in which it shall be done is provided, it can not be done in any other way.[1]

Where the right to proceed under a statute is given only to certain designated persons, or class of persons, a party seeking relief under it must bring himself within its provisions, and the fact that he is one of the persons entitled to take advantage of the statute must appear on the face of the proceedings, or the court will be without jurisdiction.[2]

Where a court of general jurisdiction has special authority conferred upon it by statute, it is so far a court of inferior or special jurisdiction, and is governed by the same rules, so far as it attempts to exercise such special authority.[3]

If the special jurisdiction conferred upon a court, whether of inferior or superior jurisdiction, is summary and extraordinary in its nature, the requirements of the statute must be strictly complied with.[4] In other cases, not summary in their nature, a substantial compliance with the statute is usually held to be sufficient.[5]

[1] Smith *v.* Chandler, 13 Ind. 513; Doctor *v.* Hartman, 74 Ind. 221, 225; Foist *v.* Coppin, 35 Ind. 473; Brown *v.* Goble, 97 Ind. 86.

[2] Shivers *v.* Wilson, 5 Harris & Johns. 130; 9 Am. Dec. 497.

[3] Gunn *v.* Howell, 27 Ala. 663; 62 Am. Dec. 785.

[4] Thatcher *v.* Powell, 6 Wheat. 119, 127; Galpin *v.* Page, 85 U. S. 350.

[5] White *v.* Conover, 5 Blkf. (Ind.) 462; Morrow *v.* Weed, 4 Ia. 77; 66 Am. Dec. 122.

"There is no difficulty in proving or in admitting the common rule in relation to inferior jurisdiction and special powers; the difficulty lies in the application of the rule to details. In reference to the exercise of a statutory power, we find various adjectives used, such as 'closely,' 'strictly,' 'rigidly,' 'exactly.' These are used by counsel. They are used in the head notes of cases, and not unfrequently in the opinions of the courts. Now, if they mean any thing, it is that the authority is to be exercised literally; and yet it is believed that not a case can be found in which a court has said that such a power must be followed with literal exactness—that is, literally. The truth is, that the rule, stripped of this verbiage and divested of expletives, is that when a special authority or power is given, and the manner of its exercise is pointed out, the power or authority must be pursued in the manner dictated. It is probable that no court has ever held that the slightest possible deviation is fatal, and yet this is the inevitable consequence if the use of the above adjectives is authoritative. The only true rule

Where a special mode of acquiring jurisdiction of the person of a non-resident defendant, other than by personal service, or in any mode not according to the course of the common law, is provided for, it is held that whether the court seeking to acquire jurisdiction is one of general or special jurisdiction a strict and literal compliance with the statutory provisions is necessary.[1]

of construction in this respect, and that which the courts have sometimes in terms, and uniformly in practice, adopted, is that the power is to be exercised substantially in the manner prescribed. These ideas will be adverted to and illustrated hereafter under the points made and the cases cited." Morrow *v.* Weed, 4 Ia. 77; 66 Am. Dec. 122, 124.

[1] Galpin *v.* Page, 85 U. S. 350; McMinn *v.* Whelan, 27 Cal. 300; Jordon *v.* Giblin, 12 Cal. 100; Ricketson *v.* Richardson, 26 Cal. 149.

In the case of Galpin *v.* Page, 85 U. S. 350, a leading case on this subject, the Supreme Court of the United States thus stated the law: "When, therefore, by legislation of a state, constructive service of process by publication is substituted in place of personal citation, and the court, upon such service, is authorized to proceed against the person of an absent party, not a citizen of the state nor found within it, every principle of justice exacts a strict and literal compliance with the statutory provisions. And such has been the ruling, we believe, of the courts of every state in the Union. It has been so held by the Supreme Court of California in repeated instances. In Jordan *v.* Giblin, 12 Cal. 100, decided in 1859, service of publication was attempted, and the court said that it had already held, 'in proceedings of this character, where service is attempted in modes different from the course of the common law, that the statute must be strictly pursued to give jurisdiction. A contrary course would encourage fraud and lead to oppression.' In Ricketson *v.* Richardson, 26 Cal. 149, decided in 1864, the court, referring to the section of the statute authorizing service by publication, said: 'These sections are in derogation of the common law, and must be strictly pursued in order to give the court jurisdiction over the person of the defendant. A failure to comply with the rule there prescribed in any particular is fatal where it is not cured by an appearance.' In McMinn *v.* Whelan, 27 Cal. 300, decided in 1866, the plaintiff in ejectment traced his title from one Maume. The defendants endeavored to show that the title had passed to one of them under a previous judgment against Maume. This judgment was recovered against Maume and others, who were non-residents of the state, upon service of summons by publication. It appeared from the record that a supplemental complaint had been filed in the action, and that the summons published was issued upon the original complaint, and not after that had been superseded by the supplemental complaint. It was objected that the publication thus made was insufficient to give the court jurisdiction of the person of the absent defendants; the objection was answered by

The question sometimes arises whether a mere recital in the record that the steps necessary to give jurisdiction have been taken or have been waived, when they are such

the position that the judgment could not be questioned collaterally for the reason that the jurisdiction of a court of general or superior jurisdiction would be presumed in the absence of evidence on the face of the record to the contrary. But the court held the objection well taken, and after referring to the case of Peacock *v.* Bell, in Saunders, said that that case 'involved the question of jurisdiction as to the subject-matter of the action and not as to the person of the defendant, and it may be doubted if a case can be found which sanctions any intendment of jurisdiction over the person of the defendant when the same is to be acquired by a special statutory mode without personal service of process. If jurisdiction of the person of the defendant is to be acquired by publication of the summons in lieu of personal service, the mode prescribed must be strictly pursued.'

"But it is said that the court exercises the same functions and the same power, whether the service be made upon the defendant personally or by publication, and that, therefore, the same presumption of jurisdiction should attend the judgment of the court in the one case as in the other. This reasoning would abolish the distinction in the presumptions of law when applied to the proceedings of a court of general jurisdiction, acting within the scope of its general powers, and when applied to its proceedings had under special statutory authority. And, indeed, it is contended that there is no substantial ground for any distinction in such cases. The distinction, nevertheless, has long been made by courts of the highest character, both in this country and in England, and we had supposed that its existence was not open to discussion. 'However high the authority to whom a special statutory power is delegated,' says Mr. Justice Coleridge of the queen's bench, 'we must take care that in the exercise of it the facts giving jurisdiction plainly appear, and that the terms of the statute are complied with. The rule applies equally to an order of the lord chancellor as to any order of petty sessions.' Christie *v.* Unwin, 3 Per. & Dav. 208.

"'A court of general jurisdiction,' says the supreme court of New Hampshire 'may have special and summary powers, wholly derived from statutes, not exercised according to the course of the common law, and which do not belong to it as a court of general jurisdiction. In such cases, its decisions must be regarded and treated like those of courts of limited and special jurisdiction. The jurisdiction in such cases, both as to the subject-matter of the judgment and as to the persons to be affected by it, must appear by the record; and every thing will be presumed to be without the jurisdiction which does not distinctly appear to be within it.' Morse *v.* Presby, 5 Fost. 302.

"The qualifications here made that the special powers conferred are not exercised according to the course of the common law, is important. When the special powers conferred are brought into action according

as may be waived, is conclusive or even *prima facie* evidence of jurisdiction. This question has been considered in another place.[1]

The question as to what are and what are not courts of inferior or special jurisdiction has also received attention elsewhere.[2]

21. ORIGINAL AND APPELLATE JURISDICTION.—Original jurisdiction is that which is conferred upon or inherent in a court in the first instance. Appellate jurisdiction is the power to review the judgment, order, or decree of some inferior court.[3]

"Appellate jurisdiction is the authority of a superior tribunal to review, reverse, correct, or affirm the decisions of an inferior judicial tribunal in cases where such decisions are brought before the superior court pursuant to law."[4]

"The essential criterion of appellate jurisdiction is that

to the course at that law; that is, in the usual form of common law and chancery proceedings, by regular process and personal service, where a personal judgment or decree is asked, or by seizure or attachment of the property where a judgment *in rem* is sought, the same presumption of jurisdiction will usually attend the judgments of the court as in cases falling within its general powers. Such is the purport of the language and decision of this court in Harvey *v.* Tyler, 2 Wall. 332. But where the special powers conferred are exercised in a special manner, not according to the course of the common law, or where the general powers of the court are exercised over a class not within its ordinary jurisdiction upon the performance of prescribed conditions, no such presumption of jurisdiction will attend the judgment of the court. The facts essential to the exercise of the special jurisdiction must appear in such cases upon the record.

"The extent of the special jurisdiction and the conditions of its exercise over subjects or persons necessarily depend upon the the terms in which the jurisdiction is granted, and not upon the rank of the court upon which it is conferred. Such jurisdiction is not, therefore, the less to be strictly pursued because the same court may possess over other subjects or other persons a more extended and general jurisdiction."

[1] *Post*, secs. 23, 25.

[2] *Ante*, sec. 7.

[3] Anderson's Dic. of Law, 580.

[4] Elliott's App. Pro., sec. 16.

it revises and corrects the proceedings in a cause already instituted and does not create the cause. In reference to judicial tribunals, an appellate jurisdiction, therefore, necessarily implies that the subject-matter has already been instituted in and acted upon by some other court whose judgment or proceedings are to be revised. This appellate jurisdiction may be exercised in a variety of forms, and, indeed, in any form which the legislature may choose to prescribe, but still the substance must exist before the form can be applied to it." [1]

Usually the jurisdiction extends only to final judgments, orders, and decrees, but this is subject to legislative regulation, and, in some of the states, the right of appeal is given from interlocutory decrees and orders. Independent, however, of some statutory enactment extending the right, it is confined to final judgments, decrees, or orders, and definitions of appellate jurisdiction usually so limit it.[2]

But as the right of appeal is entirely statutory it may be extended at the will of the law-making power. In this appeals differ from writs of error which existed at common law and may be exercised independent of statute. But this common law right to a writ of error may be modified or entirely taken away by statute, and in some of the states it has been abolished. In those states in which writs of error are abolished appellate courts can only obtain jurisdiction by appeal in the manner and at the time prescribed by statute.

A court may be vested with both original and appellate jurisdiction, and courts whose jurisdiction is essentially and so far as their express authority is concerned entirely appellate, are possessed of certain inherent and incidental powers, which belong to every court of general or superior jurisdiction, whether its jurisdiction be original or appellate.[3]

But little need be said in this connection as to the original jurisdiction of courts. The subject has been suf-

[1] 2 Story Const., sec. 1761.

[2] Anderson's Dic. of Law, 580; Elliott's App. Pro., sec. 80.

[3] *Post*, sec. 27.

ficiently covered in the several sections contained in this chapter. The subject of appellate jurisdiction calls for some special consideration, but it is only intended to treat of general principles affecting all courts, without attempting to go into details or the question as to the character or extent of the jurisdiction of any particular court or class of courts. Certain steps are necessary to be taken in order to vest appellate courts with jurisdiction. These are usually provided for by statute.

In appeals to courts of last resort the cases are usually tried by the record, and it must appear on the face of the record that the steps necessary to give the court jurisdiction of the appeal have been taken.[1]

The right of appeal is statutory and the statute must be followed or the appellate court will have no jurisdiction.[2] All necessary steps must be taken within the time prescribed by law.[3]

The time can not be extended by consent of parties.[4] Nor can the time be extended by the appellate court.[5] But the time does not, under some of the codes, run against parties laboring under legal disabilities.[6]

Where the judgment appealed from is joint the necessary steps must be taken, within the time, by all of the judgment defendants, or, if any refuse to join in the appeal, notice to them must be given, where it is required, or the appeal is not effectual. An appearance and refusal

[1] Elliott's App. Pro., sec. 12.

[2] Zechendorf *v.* Zechindorf, 1 Ariz. 401; 25 Pac. Rep. 648.

[3] Elliott's App. Pro., secs. 111, 128; Bornheimer *v.* Baldwin, 42 Cal. 27; Jarvis *v.* Hamilton, 37 Wis. 87; Clapp *v.* Hawley, 97 N. Y. 610; Stark *v.* Jenkins, 1 Wash. Ter. 421; Villabolos *v.* United States, 6 How. 81; Zechendorf *v.* Zechendorf, 1 Ariz. 401; 25 Pac. Rep. 648; Joyce *v.* Dickey, 104 Ind. 183; 3 N. E. Rep. 252; Houston *v.* Ducker, 86 Ky. 123; 5 S. W. Rep. 382.

[4] Stark *v.* Jenkins, 1 Wash. Ter. 421; Flory *v.* Wilson, 83 Ind. 391; Coggswell *v.* Hogan, 1 Wash. St. 4; 23 Pac. Rep. 835; Herrick *v.* Racine Warehouse Co., 43 Wis. 93.

[5] Wait *v.* Van Allen, 8 N. Y. 319; Verges *v.* Roush, 1 Neb. 113; Lavelle *v.* Skelly, 24 Hun (N. Y.), 642.

[6] Bunting *v.* Hooper, 59 Ind. 589; Patterson *v.* Woodland, 28 Neb. 250; 44 N. W. Rep. 112.

to join in the appeal by such defendants after the time allowed will not cure the defect of failing to give them the required notice.[1]

Where an appeal has failed for want of some of the steps necessary to perfect the same this does not prevent the party from taking a second appeal within the time prescribed.[2] But it is otherwise where the first appeal was sufficient to transfer the case to the appellate court. There can not be a second appeal when the first is pending.

Where an appeal or writ of error, is allowed upon some action of the court from which the appeal is taken, as, for example, a certificate that the cause is of such importance as to warrant an appeal, such action must be taken within the time prescribed or the appeal can not be taken or the writ of error allowed.[3]

If it appears affirmatively from the record that the court has not jurisdiction the court will dismiss the appeal, or, when the law requires it, remand the cause to another court upon motion of either party or upon its own motion whenever brought to its attention.[4]

Where the question of jurisdiction depends upon the proceedings in the court below, the record of such proceedings, made by the trial court, is conclusive, and can not be controverted or changed by other evidence.[5] The court has jurisdiction only to determine such questions as are presented by the record.[6] Authority to decide questions, not presented by the record, can not be given by consent of the parties.[7] And where the record shows that the subject-matter of the action is not within the appellate jurisdiction of the court, consent of parties can not give it jurisdiction.[8] Nor can an appeal be taken by consent

[1] Holloran *v.* Midland Ry. Co., 28 N. E. Rep. 549.

[2] United States *v.* Cury, 6 How. 106.

[3] MacLachlan *v.* McLaughlin, 126 Ill. 427; 18 N. E. Rep. 544.

[4] Elliott's App. Pro., sec. 12.

[5] McAurthur *v.* Schultz, 78 Ia. 364; 43 N. W. Rep. 223.

[6] Elliott's App. Pro., sec. 13.

[7] *Ante*, secs. 10, 12; Elliott's App. Pro., sec. 13; Board of Commissioners *v.* Newman, 35 Ind. 10.

[8] Crane *v.* Farmer, 14 Colo. 294; 23 Pac. Rep. 455.

to a court not having jurisdiction.[1] In order to call for action on the part of an appellate court, it must appear that there is an actual controversy between the parties. And although there may be nothing in the record disclosing the fact, if the court is satisfied that the question presented is not actually in controversy between the parties, but is brought up merely to obtain the decision of the court upon an abstract or hypothetical question, the appeal will not be entertained.[2] An appeal will lie only from the decision of a court, and not from the action of ministerial or other officers.[3] And where a board of officers act both in a judicial and a legislative capacity, an appeal can only be had from a decision rendered by such board, as a court, in an adversary proceeding.[4] There can be no appeal except from a decision upon a judicial question.[5]

Under the practice in most of the states, and in the federal courts, an assignment of errors must be filed in the appellate court in order to give the court jurisdiction. It is the pleading of the appellant, and is as necessary to give the appellate court authority to act as it is that a declaration, petition, or complaint, be filed in the court below in order to give that court jurisdiction.[6] And as the filing of the assignment of errors is a jurisdictional step, it must be taken within the time prescribed by law.[6] It is held, however, in some of the cases, that a party may be relieved from the consequences of a failure to file the assignment of errors within the time prescribed by law where it appears that such filing was prevented by fraud on the part of the appellee, or by accident. This is placed upon the ground that the court has the inherent power to protect its own process, and maintain its juris-

[1] Dykeman *v.* Budd, 3 Wis. 640.

[2] Elliott's App. Pro., sec. 14.

[3] Elliott's App. Pro., secs. 15, 16, 17; Auditor of State *v.* A. T. & S. F. R. R. Co., 6 Kan., 500, 504; 7 Am. Rep. 575.

[4] 1 Work's Ind. Pr. & Pl., sec. 34; Moffit *v.* The State, 40 Ind. 217; Hanna *v.* Board of Commissioners, 29 Ind. 170; Farley *v.* Board of Supervisors, 126 Ind. 468; 26 N. E. Rep. 174.

[5] Elliott's App. Pro., sec. 78.

[6] Elliott's App. Pro., sec. 303.

diction against fraudulent interference.[1] In order that the appellate court may take jurisdiction of a case, the court from which the appeal is taken must have had jurisdiction of the subject-matter.[2] The question as to the jurisdiction of the lower court may be raised for the first time in the appellate court.[3] Where an appeal is taken to a court that must try the same *de novo*, an amendment of the complaint in the appellate court by which the amount in controversy is increased beyond the jurisdiction of the court in which the action is brought, will oust the jurisdiction of the appellate court.[4]

Provision is sometimes made for the transfer of actions from an inferior to a superior court where an issue is raised, not within the jurisdiction of the court before which the action is pending, as for example, where the title to real estate is brought in question before a justice of the peace. In such cases it must clearly appear that an issue has been presented that authorizes the transfer of the cause or the court to which the action is sent will have no jurisdiction.[5] Jurisdiction thus conferred is original, and not appellate, and the court to which the action is certified tries the same as if it had been brought originally in that court.[6] Therefore, if the court to which the action is certified would not have had jurisdiction if the action had been commenced therein, the determination of the other court that it has not jurisdiction, and the certification of the case to the higher court can give the latter no jurisdiction.[6] And if the defendant who has made the issue in the lower court that ousted its

[1] Smyth *v.* Boswell, 117 Ind. 365; 20 N. E. Rep. 263. *Post*, sec. 27.

[2] *Ante*, sec. 12; *Post*, sec. 22; Felt *v.* Felt, 19 Wis. 208; Stringham *v.* Board of Supervisors, 24 Wis. 594; Sexton *v.* Willard, 27 Wis. 465; Elliott's App. Pro., sec. 79.

[3] *Post*, sec. 22; Cerro Gordo County *v.* Wright County, 59 Ia. 485; 13 N. W. Rep. 645.

[4] *Ante*, sec. 16; Pritchard *v.* Bartholomew, 45 Ind. 219; Mays *v.* Dooley, 59 Ind. 287.

[5] *Post*, sec. 24; Verbeck *v.* Verbeck, 6 Wis. 157; City of Santa Cruz *v.* Santa Cruz R. R. Co., 56 Cal. 143; Arroyo Ditch, etc., Co. *v.* Superior Court, 92 Cal. 47; 28 Pac. Rep. 54.

[6] Arroyo Ditch, etc., Co. *v.* Superior Court, 92 Cal. 47; 28 Pac. Rep. 54.

jurisdiction, abandons such issue in the court to which the same is certified, the latter court thereby loses jurisdiction of the action.[1]

22. When and how question of jurisdiction may be raised.—The time when and the manner in which the question of jurisdiction may be raised depends in part upon the character of the court, whether it be one of superior and general jurisdiction, or one of inferior or special jurisdiction. The distinction between these different kinds of courts has been considered,[2] as well as the difference in the manner of proving and disproving the jurisdiction of each,[3] and the presumptions that prevail in aid of the jurisdiction of courts of general jurisdiction.[4]

The right also depends, in part, upon whether it is jurisdiction of the subject-matter or of the person that is assailed. As a rule, the failure to object to the jurisdiction of the person, at the proper time, where the party appears, is a submission to the jurisdiction of the court, and waives the right to contest such jurisdiction at any subsequent time.[5] Therefore, if a defendant believes that the court has not, for any reason, obtained jurisdiction of his person, he should, if he appears at all, enter his appearance for the special purpose of objecting to the jurisdiction, and at once enter such objection.[6] But if he is satisfied that the court has not jurisdiction of his person, and that jurisdiction will not be presumed, he need not appear at all; and any judgment rendered against him, without jurisdiction, is void the same as if the court were without jurisdiction of the subject-matter.[7]

The effect of a general appearance, after having ap-

[1] City of Santa Cruz *v.* Santa Cruz R. R. Co., 56 Cal. 143.

[2] *Ante*, sec. 7. [3] *Post*, sec. 23. [4] *Post*, sec. 25.

[5] *Ante*, sec. 13; Caughey *v.* Vance, 3 Pinney (Wis.), 275; Newell *v.* Gatling, 7 Ind. 147; Puterbaugh's Pl. & Prac. (Com. Law), 144; Day *v.* Henry, 104 Ind. 324; 4 N. E. Rep. 44; Kenney *v.* Greer, 13 Ill. 432; 54 Am. Dec. 439; Holloway *v.* Freeman, 22 Ill. 197, 202.

[6] *Ante*, sec. 13; New Albany, etc., R. R. Co. *v.* Combs, 13 Ind. 490; Michels *v.* Stork, 44 Mich. 2; Baily *v.* Schrader, 34 Ind. 260.

[7] *Post*, secs. 23, 25, 26.

peared specially and made objection, which has been overruled, is the same as if no such objection had been made. By appearing afterward and contesting the case on the merits, a defendant loses his right to contest the ruling of the court below on his objection to the jurisdiction, on appeal. If a party wishes to insist upon the objection that he is not in court, he must keep out for all purposes except to make that objection.[1]

If jurisdiction depends upon the residence of the defendants, one of whom resides within the jurisdiction, and the action is dismissed as to him, the non-resident defendants may oust the jurisdiction of the court by pleading and proving that the resident defendant was made a party for the fraudulent purpose of giving the court jurisdiction. The appearance of the non-resident parties under such circumstances will not estop them from raising the question of jurisdiction as soon as the fraud is discovered.[2]

A distinction is made, with respect to the effect of an appearance, between a service made within the jurisdiction of the court and one made at a place where it could not legally be made, it being held in the latter case that a subsequent appearance and defense on the merits does not waive the objection to the jurisdiction.[3]

[1] Thayer *v.* Dove, 8 Blkf. (Ind.) 567; Lowe *v.* Stringham, 14 Wis. 222, 225; Blackwood *v.* Jones, 27 Wis. 498, 500; Caughey *v.* Vance, 3 Pinney (Wis.), 275, 278; New Albany, etc., R. R. Co. *v.* Combs, 13 Ind. 490; Eddy *v.* Lafayette, 49 Fed. Rep. 807; Hohl *v.* Town of Westford, 33 Wis. 328.

[2] Shryer *v.* Miner, 20 Ind. 175.

[3] "The right of the defendant to insist upon the objection to the illegality of the service was not waived by the special appearance of counsel for him to move the dismissal of the action on that ground, or what we consider as intended, that the service be set aside; nor, when that motion was overruled, by their answering for him to the merits of the action. Illegality in a proceeding by which jurisdiction is to be obtained is in no case waived by the appearance of the defendant for the purpose of calling the attention of the court to such irregularity; nor is the objection waived when being urged it is overruled, and the defendant is thereby compelled to answer. He is not considered as abandoning his objection because he does not submit to further proceedings without contestation. It is only where he pleads to the merits in the

An appearance after a default and making an ineffectual motion to set aside the judgment will not operate as a waiver of defective service.[1] Nor will an appearance and

first instance, without insisting upon the illegality, that the objection is deemed to be waived." Harkness *v.* Hyde, 98 U. S. 476, 479.

The case of Harkness *v.* Hyde was distinguished from an ordinary defect, or want of service, by the circuit court of appeals, eighth circuit, in Eddy *v.* Lafayette, 49 Fed. Rep. 809, in the following language: "We are also of the opinion that the jurisdiction of the lower court may be maintained on the further ground that, by answering to the merits and going to trial after the motion to quash the service of summons had been overruled, the receivers submitted to the jurisdiction of the court, and should not be permitted to question its jurisdiction in this court. In so holding, we have not overlooked the decision in Harkness *v.* Hyde, 98 U. S. 476, but we believe that case may be fairly distinguished from the one at bar. In Harkness *v.* Hyde the process involved had not only been served outside of the territorial jurisdiction of the court, and within the limits of an Indian reservation, but the officer who served the process was guilty of a violation of law in entering the reservation for that purpose. In the case at bar the service was had at a place within the jurisdiction of the court from which the process emanated. It also had jurisdiction of the subject-matter of the suit, by virtue of the fact that the negligent acts complained of had been committed within the Indian Territory. Under these circumstances, we are unable to concede that the receivers may raise the question of jurisdiction in this court after pleading to the merits, and entering upon a long trial in the lower court. It is a general rule that mere defects in the service of process may be waived by an appearance, where the court has jurisdiction of the subject-matter of the controversy, and the defect in the service only impairs the jurisdiction over the person of the defendant. Such is the rule in the State of Arkansas, whose laws have been extended over the Indian Territory, and such is also the rule in other states. Railway Co. *v.* Barnes, 35 Ark. 95; Martin *v.* Goodwin, 34 Ark. 682; Kronski *v.* Railway Co., 77 Mo. 368; Rippstein *v.* Insurance Co., 57 Mo. 86; Estill *v.* Railroad Co., 41 Fed. Rep. 853; Railway Co. *v.* McBride, 141 U. S. 127; 11 Sup. Ct. Rep. 982.

"The cases are very exceptional where a litigant is at liberty to deny the jurisdiction of a court, after defending on the merits, and taking the chances of making a successful defense precisely as if it had jurisdiction. If the receivers desired to raise the question of jurisdiction in this court, we are of the opinion that they should have refused to appear in the lower court; or, having appeared for the purpose of moving to quash the service of process, that they should have abandoned the case when their motion to quash the service was overruled."

[1] Mills *v.* The State, 10 Ind. 114; Briggs *v.* Sneghan, 45 Ind. 14.

contest of the amount of damages after a default operate as such waiver.[1]

It is only where he desires to defend the action that it is necessary for a defendant to appear specially and object to the jurisdiction.

Objection to the jurisdiction, whether of the subject-matter or the person, may be made in various ways:

(a) *By motion to dismiss.*[2]

Special provision is made for the dismissal of causes for want of jurisdiction in the federal courts.[3] And for remanding a cause, in case of removal, to the state court, where the cause is not cognizable in the federal court.[4]

It is held that where the objection is to the jurisdiction of the person, and does not appear on the face of the complaint, it must be presented by a plea in abatement and not by motion.[5] But, where proof of non-residence and publication is made, the defendant may, on motion, establish the fact that he is a resident of the county, and thus defeat the jurisdiction of the court attempted to be obtained by constructive notice.[6]

Again, it is held that, if the objection is that the summons was not properly served, the question can not be raised by demurrer or answer, but must be presented by motion.[7]

(b) *Under the codes, if the court is one of general jurisdiction, and the want of jurisdiction appears on the face of the complaint, the objection may be raised by demurrer.*[8]

[1] Briggs *v.* Sneghan, 45 Ind. 14, 18.

[2] Dixon *v.* Hill, 8 Ind. 147; State *v.* Whitewater Valley Canal Co., 8 Ind. 320; Collins *v.* Collins, 37 Pa. St. 387; Branner *v.* Chapman, 11 Kan. 118; Kinnaman *v.* Kinnaman, 71 Ind. 417; Parker *v.* Burrell, 3 Blkf. (Ind.) 411; Allen *v.* Demarest, 41 N. J. Eq. 162; 2 Atl. Rep. 655.

[3] Act of March 3, 1875, ch. 137, sec. 5 (18 Stat. at L. 472); Foster's Fed. Prac., secs. 293, 391; Vannerson *v.* Leverett, 31 Fed. Rep. 376.

[4] Foster's Fed. Prac., sec. 393; Work's Rem. of Causes, sec. 10; Sup. Rev. Stat. 175, sec. 5.

[5] Ludwick *v.* Beckamire, 15 Ind. 198; Holloway *v.* Freeman, 22 Ill. 201; Baily *v.* Schrader, 34 Ind. 260.

[6] Evans *v.* Iles, 7 Ohio St. 234.

[7] Nones *v.* Hope Mut. Life Ins. Co., 5 How. Prac. 96.

[8] Bliss's Code Pl., secs. 405, 406; Godfrey *v.* Godfrey, 17 Ind. 6; 79 Am.

It must be remembered, however, that, so far as common-law actions are concerned, the right to raise the question of jurisdiction by demurrer is a purely statutory one. At common law, the question of jurisdiction could not be raised by demurrer, but must be entered by a special plea to the jurisdiction.[1]

It would seem to follow, therefore, that in a United States court, sitting as a common-law court, the question must be raised by plea and not by demurrer. But it is held that in common law proceedings the practice in the state courts shall control. Under this rule, where the question may be raised by demurrer in the state courts, it may be raised in the same way in a United States court sitting in that state.[2] And it is further held that, where the citizenship appears on the face of the petition or complaint and shows a want of jurisdiction, a plea in abatement is not necessary, but the question may be raised by demurrer upon a special appearance entered for that purpose, and that a plea in abatement is only necessary where the petition or complaint alleges the facts showing jurisdiction and the defendant desires to controvert the averment.[3]

In a court of equity, the question of jurisdiction may be raised by demurrer where no sufficient ground is shown in the bill for the interference of a court of equity.[4]

The demurrer may go to the local jurisdiction, the jurisdiction of the subject-matter, or of the person.[5]

In most, if not all, of the codes of the several states in this country, the equitable rule on this subject has been

Dec. 448; Coyt *v.* Haven, 30 Conn. 190; 79 Am. Dec. 244; 1 Work's Ind. Pr. & Pl., sec. 474; Brownfield *v.* Weicht, 9 Ind. 394; Boone's Code Pl., sec. 47; Keiser *v.* Yandes, 45 Ind. 174.

[1] Stephen on Pl. 83; Roberts *v.* Lewis, 144 U. S. 653; 12 Sup. Ct. Rep. 781; Sheppard *v.* Graves, 14 How. 505, 509.

[2] Roberts *v.* Lewis, 144 U. S. 653; 12 Sup. Ct. Rep. 781.

[3] Susquehanna, etc., Railroad & Coal Co. *v.* Blatchford, 11 Wall. 172; Meyer *v.* Herrera, 41 Fed. Rep. 65; Halstead *v.* Manning, 34 Fed. Rep. 565.

[4] Story's Eq. Pl., sec. 472; Foster's Fed. Prac. 108.

[5] Barton's Suit in Eq. 83.

adopted, and a want of jurisdiction is made a ground of demurrer.

Under the chancery practice, it is held that after a defendant has put in an answer to a bill, submitting himself to the jurisdiction of the court, without objection, it is too late to insist that the complainant has a perfect remedy at law, unless the court of chancery is wholly incompetent to grant the relief sought by the bill.[1]

The bill may be dismissed by the court, on its own motion, on the ground that there is a perfect remedy at law, at any stage of the proceedings, but the party must raise the question by demurrer or answer, or it is waived.[2] But a different rule has been laid down under the codes, on the ground that such matter could not be set up by answer.[3]

If the case is one in which a court of chancery can not afford relief, which is a case of an entire want of jurisdiction, the rule is the same as in a court of law. The objection is not waived by answering and going to trial on the merits, but may be raised at any time.[4] And, where a cause of action, cognizable at law, is entertained in equity because of some equitable relief sought, and under the evidence no such equitable relief can be granted, the court should dismiss the action.[5]

If the want of jurisdiction in a court of equity does not appear on the face of the bill, it should be presented by plea and not by answer.[6]

It is held in Illinois that, where the summons has been

[1] Grandin *v.* Le Roy, 2 Paige, 509; Le Roy *v.* Platt, 4 Paige, 76; Cumming *v.* The Mayor, etc., 11 Paige, 596; Truscott *v.* King, 6 N. Y. 147; Ryan *v.* Duncan, 88 Ill. 144; Gifford *v.* Thorn, 7 N. J. Eq. 90; Consolidated Roller Mill Co. *v.* Coombs, 39 Fed. Rep. 25.

[2] Lehigh, etc., Iron Co. *v.* Trotter, 43 N. J. Eq. 185; 10 Atl. Rep. 607.

[3] De Bussierre *v.* Holladay, 55 How. Pr. 210.

[4] Meux *v.* Anthony, 11 Ark. 411; 52 Am. Dec. 274, 280; Powell *v.* Waldon, 89 N. Y. 328, 333; 42 Am. Rep. 301; Graveley *v.* Graveley, 84 Va. 145; 4 S. E. Rep. 218; Buffalo *v.* Town of Pocahontas, 85 Va. 222; 7 S. E. Rep. 238.

[5] Gamage *v.* Harris, 79 Me. 531; 11 Atl. Rep. 422.

[6] Livingston *v.* Story, 11 Pet. 351, 393.

sent to a foreign county in the state, the question of jurisdiction must be raised by plea in abatement, and can not be raised by demurrer, or by a writ of error after default.[1] And the plea is waived if not presented to the court before the trial is commenced.[2] But, where it appears from the evidence at the trial that a case against a foreign corporation is not one that is authorized to be brought in the state in which the action is pending, the action should be dismissed on motion.[3]

If, however, the defendant relies upon the fact of nonresidence, it must allege the fact by way of answer, and a party can not move to dismiss at the trial on that ground.[4]

The right given by statute to have suit brought in the county where the land, the title to which is in controversy, is situated is held, in some of the cases, to be a personal privilege which is waived by a failure to raise the question by plea in abatement to the jurisdiction.[5]

c. *If the court is one of inferior or special jurisdiction, and jurisdiction does not affirmatively appear on the face of the complaint, the objection may be taken by demurrer under the codes*,[6] or by answer, or by motion in arrest of judgment.[7]

d. *By plea or answer where the want of jurisdiction does not appear on the face of the record*.[8]

Where the objection is for want of jurisdiction of the person, a plea in abatement is proper.[9] But, strictly

[1] Hardy *v.* Adams, 48 Ill. 532; Wallace *v.* Cox, 71 Ill. 548.

[2] Eller *v.* Richardson, 89 Tenn. 575; 15 S. W. Rep. 650.

[3] Perry *v.* Erie Transfer Co., 19 N. Y. Sup. 239.

[4] Perry *v.* Erie Transfer Co., 16 N. Y. Sup. 153.

[5] Walker *v.* Stroud, 6 S. W. Rep. 202.

[6] Godfrey *v.* Godfrey, 17 Ind. 6; 79 Am. Dec. 448; 1 Work's Ind. Pr. & Pl., sec. 475; Toledo, Wabash, etc., R. Co. *v.* Milligan, 52 Ind. 505.

[7] Toledo, Wabash, etc., R. Co. *v.* Milligan, 52 Ind. 505.

[8] Bliss' Code Pl., sec. 419; Godfrey *v.* Godfrey, 17 Ind. 6; 79 Am. Dec. 448; Brownfield *v.* Weicht, 9 Ind. 394; Foster's Fed. Prac., sec. 126; 1 Work's Ind. Pr. & Pl., secs. 474, 476; Boone's Code Pl., sec. 47; Gervais *v.* Chicago, etc., Ry. Co., 58 Hun. 610; 12 N. Y. Sup. 312; Ragan *v.* Haynes, 10 Ind. 348; Merrill *v.* Lake, 16 Ohio, 373, 406; National Bank *v.* American Ship Building Co., 2 Atl. Rep. 511.

[9] National Bank *v.* American Ship Building Co., 2 Atl. Rep. 511; Min-

speaking, the plea is to the jurisdiction, and should be in that form.[1]

It is provided by statute, in some of the states, that where the objection goes to the jurisdiction of the person, and it appears on the face of the complaint, it must be presented by demurrer, or it is waived.[2] And no doubt this is the effect of the general rule that objection to the jurisdiction of the person must be presented before taking any other step in the case.

It is also held that the want of jurisdiction of the person is waived by demurring to the complaint on other grounds and not upon the question of jurisdiction.[3]

Whether this would be so where the want of jurisdiction does not appear upon the face of the complaint may be questioned. But the rule that where a party enters a special appearance his action must be confined to jurisdictional grounds or his appearance will be general,[4] would seem to compel him, if he depended upon an answer, to confine himself to the question of jurisdiction alone; and, if so, a demurrer on other grounds would cut off his right to raise the question by answer. The filing of a demurrer is uniformly held to be a full appearance to the action and submission to the jurisdiction of the court.[5] And the subsequent withdrawal of the demurrer by leave of the court does not change its effect as an appearance to the action.[6]

If the objection is for want of jurisdiction of the person because of some defect in the issuance or service of process, an appeal is held, in some cases, to constitute such an appearance as will waive the defect and give jurisdic-

eral Point R. Co. *v.* Keep, 22 Ill. 124; 74 Am. Dec. 124; Ludwick *v.* Beckamire, 15 Ind. 198.

[1] Drake *v.* Drake, 83 Ill. 526.

[2] 1 Work's Ind. Pr. & Pl., sec. 519; Keiser *v.* Yandes, 45 Ind. 174; Linden *v.* Green, 81 Ia. 365; 46 N. W. Rep. 1108.

[3] Coffee *v.* City of Chippewa Falls, 36 Wis. 121; Slauter *v.* Hollowell, 90 Ind. 286.

[4] *Ante*, sec. 15. [5] *Ante*, sec. 13; Slauter *v.* Hollowell, 90 Ind. 286.

[6] Evans *v.* Iles, 7 Ohio St. 234.

tion.[1] But this can not be so where a special appearance has been entered in the court below and the question there presented and properly reserved and presented on appeal.[2]

e. *By a motion to vacate the judgment.*[3]

In most of the states, provision is made for the setting aside of defaults and the vacation of judgments upon motion, within a limited time, upon terms to be imposed by the court. Under such statutes, the judgment may be vacated, although the judgment appears upon its face to be valid, by evidence *de hors* the record.

Independent of such statutory authority, it is held in some of the states that a judgment may be vacated on mere motion. But the right is confined to cases where the judgment is void on its face.[4] And, even where the want of jurisdiction is apparent on the face of the record, an action regularly brought to set aside the judgment is the better course, and should be required.[5]

f. *By an action brought to set aside the judgment.*[6]

g. *The court may refuse to entertain jurisdiction and dismiss the action of its own motion.*[7] And in some cases the court may, as in case of concurrent jurisdiction of a court of equity, entertain jurisdiction, or not, at its discretion.[8]

[1] Klaise *v.* The State, 27 Wis. 462; Barnum *v.* Fitzpatrick, 11 Wis. 81; Ruth *v.* Green Bay, etc., Ry. Co., 37 Wis. 344.

[2] Barnum *v.* Fitzpatrick, 11 Wis. 81.

[3] Ætna Life Ins. Co. *v.* McCormick, 20 Wis. 265; Weatherbee *v.* Weatherbee, 20 Wis. 494; Reynolds *v.* Fleming, 30 Kan. 106; 1 Pac. Rep. 61; Town of Wayne *v.* Caldwell, 47 N. W. Rep. 547.

[4] People *v.* Harrison, 84 Cal. 607; 24 Pac. Rep. 311; People *v.* Greene, 74 Cal. 400; 16 Pac. Rep. 197.

[5] People *v.* Harrison, 84 Cal. 607; 24 Pac. Rep. 311.

[6] Freeman on Judg., sec. 495; Bridgeport Savings Bank *v.* Eldridge, 28 Conn. 556; 73 Am. Dec. 688; People *v.* Harrison, 84 Cal. 607; 24 Pac. Rep. 311; Taylor *v.* Lewis, 19 Am. Dec. 137, note; Crafts *v.* Dexter, 8 Ala. 767; 42 Am. Dec. 666; Johnson *v.* Coleman, 28 Wis. 452, 455; 99 Am. Dec. 193; Brown *v.* Goble, 97 Ind. 86; Dunlap *v.* Steeve, 92 Cal. 344.

[7] Winchester *v.* Browne, 59 Hun, 626; 13 N. Y. Sup. 655; Phillips *v.* Welch, 11 Nev. 187; Dewey *v.* Hyde, 1 Pinney (Wis.), 469; Robertson *v.* State, 109 Ind. 79; 10 N. E. Rep. 582.

[8] Seymour *v.* Long Dock Co., 20 N. J. Eq. 396.

This may be done in an action in favor of a citizen of another state against a foreign corporation,[1] or an action for personal injuries between citizens of another state where the injury was committed out of the state.[2]

h. *By motion for non-suit.*[3]

i. *Where the objection appears on the face of the record in a court of general jurisdiction, or does not appear in a court of inferior or special jurisdiction, it may be raised by a motion in arrest of judgment.*[4]

j. *The question of jurisdiction of a lower court may be raised in a superior court, independent of any appeal, by certiorari.*[5]

k. *By prohibition.*[6]

l. *The question may be raised in the court in which the proceedings were had or in any other court of competent jurisdiction by habeas corpus.*[7]

When there is a want of jurisdiction of the subject-matter the judgment of the court may be attacked collaterally whenever any benefit or protection is sought under it.[8]

The question may be raised on appeal by motion to dismiss.[9] Or by assignment of error.[10] But when the question

[1] *Ante*, sec. 15; Gervais *v.* Chicago, etc., Ry. Co., 58 Hun, 610; 12 N. Y. Sup. 312.

[2] Burdick *v.* Freeman, 120 N. Y. 420; 24 N. E. Rep. 949.

[3] 16 Am. & Eng. Enc. of L. 740.

[4] Toledo, Wabash, etc., R. Co. *v.* Milligan, 52 Ind. 505; Loeb *v.* Mathis, 37 Ind. 306.

[5] Ex parte Lange, 85 U. S. 163; Maxwell *v.* Rives, 11 Nev. 213; Bouton *v.* City of Brooklyn, 7 How. Pr. 198, 206.

[6] Bruner *v.* Superior Court, 92 Cal. 239, 251, 259; 28 Pac. Rep. 341; Levy *v.* Wilson, 69 Cal. 105; 10 Pac. Rep. 272; Quimbo Appo *v.* The People, 20 N. Y. 531; People *v.* Wayne Circuit Court, 11 Mich. 393; 83 Am. Dec. 754.

[7] In re Staff, 63 Wis. 285; 23 N. W. Rep. 587; In re Millburn, 59 Wis. 24; 17 N. W. Rep. 965; Ex parte Coy, 127 U. S. 731; 8 Sup. Ct. Rep. 1263; People *v.* Liscomb, 60 N. Y. 559; 19 Am. Rep. 211; Commonwealth *v.* Lecky, 1 Watts, 66; 26 Am. Dec. 37, 41, note; Petition of Crandall, 34 Wis. 177; Ex parte Snow, 120 U. S. 274; 7 Sup. Ct. Rep. 556.

[8] Putnam *v.* Man, 3 Wend. 202; 20 Am. Dec. 686; Elliott *v.* Lessee of Peirsol, 1 Pet. 328.

[9] Elliott's App. Pro., secs. 408, 409.

[10] Elliott's App. Pro., secs. 328, 330; 2 Work's Ind. Pr. & Pl., sec. 1085;

arises upon a defective service and not an entire want of notice, or no jurisdiction, the objection must be first made in the court below.[1] And this rule has been applied where there has been a judgment by default on the ground that there must be a motion to set aside the default in the court below.[2]

But the better rule is that where the judgment is by default, and the party has not had his day in court below, he may, where the record fails to show any service, or shows an insufficient one, raise the question in the appellate court for the first time.[3]

If there is an entire want of jurisdiction which would render the judgment void the objection may be made for the first time in the appellate court, and this may be done either by a motion to dismiss or by an assignment of error.[4]

In order to reach the question of jurisdiction by assignment of error, where the court is one of general jurisdiction, want of jurisdiction must affirmatively appear. The rule is the same as in case of a demurrer.[5]

The rule is different in the United States courts, where

Riley *v.* Butler, 36 Ind. 51; McGoldrick *v.* Slevin, 43 Ind. 522; Eslava *v.* Lepretre, 21 Ala. 504; 56 Am. Dec. 271; Dewey *v.* Hyde, 1 Pinney (Wis.), 469; Lane *v.* Taylor, 40 Ind. 495.

[1] Elliott's App. Pro., secs. 330, 331; Pennoyer *v.* Neff, 95 U. S. 714.

[2] De Armond *v.* Adams, 25 Ind. 455; Elliott's App. Pro., sec. 334.

[3] Cochnower *v.* Cochnower, 27 Ind. 254. In this case the court said: "While there may be sound reason to require that advantage shall not be first taken in the appellate court of a defective return of service, which might have been amended below if attention had been there called to it, and where the defendant had such knowledge of the suit as gave him opportunity to make the question there, we are unable to support, by a single weighty consideration, a rule which requires the performance of impossibilities below, as a condition precedent to the right to be heard in this court. When the legislature makes such a rule, we shall administer it, but we will not be responsible for its origin. Accordingly, in Abdil *v.* Abdil, 26 Ind. 287, where, without any process, a default was entered and a judgment rendered, we reversed the judgment for the error in entering the default."

[4] Elliott's App. Pro., secs. 331, 332.

[5] Riley *v.* Butler, 36 Ind. 52; Elliott's App. Pro., sec. 502.

the jurisdiction must appear on the face of the record. If it does not so appear the judgment will be reversed by the supreme court on an assignment of error that the court below had not jurisdiction.[1] So if the declaration or petition does not show that the parties are within the jurisdiction of the court.[2]

The question as to the jurisdiction of the appellate court may be raised by a motion to dismiss the appeal.[3] Or, where a judgment has been rendered, by a motion to vacate the same.[4] Or by a special plea to the jurisdiction.[5]

The enforcement of a judgment may be prevented by injunction on the ground of want of jurisdiction.[6] But this can not be done where the party has an adequate and speedy remedy by application to the court in which the judgment was rendered.[7]

A court of equity will not enjoin proceedings in a common law court which are void on their face, for want of jurisdiction, for the reason that in such a case the party has an adequate remedy at law.[8] And mere laches on the part of the party seeking relief, in failing to make application to the court in which the action was pending, will prevent his obtaining relief by injunction.[9]

A court of equity will not enjoin the enforcement of a

[1] Continental Life Ins. Co. *v.* Rhoads, 119 U. S. 237; 7 Sup. Ct. Rep. 193; United States *v.* Southern Pac. R. Co., 49 Fed. Rep. 296.

[2] Brown *v.* Keene, 8 Pet. 112.

[3] Hayne, New Trial and App., sec. 272, p. 817; Stone *v.* Elkins, 24 Cal. 125; Poland *v.* Carrigan, 20 Cal. 175.

[4] Ex parte Crenshaw, 15 Pet. 119.

[5] Elliott's App. Pro., secs. 408, 409.

[6] Wood *v.* Stanberry, 21 Ohio St. 142; 10 Am. & Eng. Enc. of Law, 907; Grass *v.* Hess, 37 Ind. 193; Glass *v.* Smith, 66 Tex. 548; 2 S. W. Rep. 195.

[7] Luco *v.* Brown, 73 Cal. 3; 14 Pac. Rep. 366; Comstock *v.* Clemmens, 19 Cal. 78; Gates *v.* Lane, 49 Cal. 266; Ede *v.* Hazen, 61 Cal. 360, Moulton *v.* Knapp, 85 Cal. 385; 24 Pac. Rep. 803.

[8] St. Louis, etc., R. Co. *v.* Reynolds, 89 Mo. 146; 1 S. W. Rep. 208; Gates *v.* Lane, 49 Cal. 266; High on Inj., sec. 89; Sanchez *v.* Carriaga, 31 Cal. 170.

[9] Moulton *v.* Knapp, 85 Cal. 385; 24 Pac. Rep. 803; Yancey *v.* Downer, 5 Littell, 8; 15 Am. Dec. 35.

judgment merely on the ground that it is irregular or void. The court proceeds upon equitable considerations only, and it must further appear that the judgment is inequitable and that its enforcement would work injustice.[1]

Provision is made in some of the states whereby a defendant constructively served may be relieved within a certain time from a judgment, and be allowed to come in and defend. And it is held that where a judgment by default has been fraudulently obtained upon constructive service, a court of equity will relieve a defendant after the time fixed by statute.[2]

The right to move to vacate a judgment within a specified time for irregularities, or in case of accident or surprise, as provided by statute, must not be confounded with the right to vacate a void judgment, which is an inherent right of the court where no statute on the subject has been enacted.[3]

The general rule is that the power to vacate or change its judgment is limited by the term, and can not be exercised afterward.

The right to object for want of jurisdiction of the person is always subject to the rule that the objection may be waived by consent, or an appearance, or other submission to the jurisdiction of the court.[4] And where the court has jurisdiction of the subject-matter, if the same were within its territorial jurisdiction, it has been held that the objection that the action is brought in the wrong county, as where property out of the county is taken on a writ of replevin, will be waived by a general appearance.[5]

Usually provision is made by statute for changing the place of trial where the action is brought in the wrong county, and requiring the application to be made before or

[1] Thomas *v.* West, 59 Wis. 103; Stokes *v.* Knarr, 11 Wis. 389; Ableman *v.* Roth, 12 Wis. 90; 7 Lawson's Rights & Rem., sec. 3702; High on Inj., sec. 125.

[2] Dunlap *v.* Steere, 92 Cal. 344; 28 Pac. Rep. 563.

[3] Dederick's Adm. *v.* Richley, 19 Wend. 108; Manufacturers, etc., Bank *v.* Boyd, 3 Denio, 257; Ætna Life Ins. Co. *v.* McCormick, 20 Wis. 265, 268.

[4] *Ante.*, sec. 13; Boone's Code Pl. 259.

[5] Bonesteel *v.* Gardner, 0 Dak. 000; 46 N. W. Rep. 590.

at the time of pleading to the action. Under such a statutory provision, if the application is not made within the time limited, the objection to the jurisdiction is waived.

If the court is one of general jurisdiction it need not appear, affirmatively, that the subject-matter is within the jurisdiction of the court, or that it has obtained jurisdiction of the person. Both will be presumed, and the fact that the court has not jurisdiction must be shown by answer.[1] And where the question of jurisdiction arises in case of a domestic judgment of a court of general jurisdiction, all presumptions are in favor of its jurisdiction, both of the subject-matter and of the person.[2] But this rule does not apply, where the attack is direct, to the courts of the United States, whose jurisdiction is confined to what is expressly given them by the constitution and statutes, and must appear upon the record.[3]

In a United States court sitting as a court of equity a demurrer will lie to the bill if the jurisdiction of the court does not affirmatively appear therefrom, while in a state court the presumption of jurisdiction, in the absence of any showing, will withstand a demurrer, and the presumption can only be overcome by answer.[4]

The effect of a return by the proper officer showing service of process is a matter about which there is a great diversity of opinion in the decided cases. In some of the cases it is held that in an action brought in a court of equity to set aside a judgment for want of jurisdiction of the person the return of the officer is not conclusive, but may be disproved and the judgment set aside, notwithstanding such return.[5]

There are cases holding, however, that the only ground

[1] *Post*, secs. 23, 25; Godfrey *v.* Godfrey, 17 Ind. 6; 79 Am. Dec. 448; 1 Works' Ind. Pr. & Pl., sec. 474; Gervais *v.* Chicago, etc., Ry. Co., 58 Hun, 610; 12 N. Y. Sup. 312; Kinnaman *v.* Kinnaman, 71 Ind. 417.

[2] *Post*, secs. 23, 25; Kenney *v.* Greer, 13 Ill. 432, 449; 54 Am. Dec. 439.

[3] Foster's Fed. Prac., sec. 108; Turner *v.* Bank of North Am., 4 Dalt. 8; Godfrey *v.* Terry, 97 U. S. 171; *ante*, sec. 7; *post*, sec. 25.

[4] Foster's Fed. Prac., sec. 174; Godfrey *v.* Terry, 97 U. S. 178.

[5] Freeman on Judg., sec. 495; Bridgeport Sav. Bank *v.* Eldridge, 28 Conn. 556; 73 Am. Dec. 688; Owens *v.* Ranstead, 22 Ill. 161, 167; Ridgeway *v.* Bank of Tenn., 11 Hump. 523.

upon which a judgment can be set aside by a court of equity, as against the officer's return, is that the return is false and fraudulent, and that the return is conclusive unless the plaintiff or other party recovering the judgment is connected with the fraud. These cases hold that the only remedy in such a case is against the officer making the false return.[1]

The rule that the return of the officer is conclusive on the parties is not adhered to in many of the decided cases where the question is one of jurisdiction depending upon whether there has been service of summons or not.[2]

The return of the officer is generally held to stand upon the same footing, in this respect, as other matters appearing in the record showing that the court had jurisdiction. The effect of recitals in the record or other matters showing jurisdiction is considered elsewhere.[3]

The general rule, supported by the great weight of authority, is that the return of the officer is conclusive upon the parties in case of a collateral attack upon a domestic judgment.[4] But the conclusiveness of the return is confined to facts of which the officer must necessarily certify from his own personal knowledge, and does not extend to matters in which he must be dependent upon others for information; for example, the fact whether a person upon whom he serves process is an agent of a corporation.[5]

A court will not maintain jurisdiction where it appears to have been obtained by the fraud of the plaintiff or others acting for him. Therefore, if it appears that a party has been brought within the jurisdiction of the court by deceit, and the summons served upon him, the service will be set aside.[6] But, where the defendant appears and

[1] Walker *v.* Robbins, 14 How. 584; Johnson *v.* Jones, 2 Neb. 126, 132; Taylor *v.* Lewis, 2 J. J. Mar. 400; 19 Am. Dec. 135; Cavanaugh *v.* Smith, 84 Ind. 380; Egery *v.* Buchanan, 5 Cal. 53.

[2] Carr *v.* Commercial Bank of Racine, 16 Wis. 50, and cases cited.

[3] *Post*, sec. 23.

[4] Cavanaugh *v.* Smith, 84 Ind. 380; Nichols *v.* Nichols, 96 Ind. 433; Egery *v.* Buchanan, 5 Cal. 53; Splahn *v.* Gillespie, 48 Ind. 397; 1 Works' Ind. Prac. & Pl., sec. 244; Johnson *v.* Patterson, 59 Ind. 237.

[5] Forrest *v.* Union Pac. R. Co., 47 Fed. Rep. 1.

[6] Baker *v.* Wales, 45 How. Pr. 137; Steiger *v.* Bonn, 59 How. Pr. 496.

pleads to the action, the objection to the manner of the service is thereby waived.[1]

The question of jurisdiction of the subject-matter may arise in the court in which the action is pending, or on appeal, or by action in another court to set aside the judgment, or it may arise in the court in which the proceedings were had, or in some other court. Where the attack is direct, the question whether the court is one of general or of inferior or special jurisdiction is immaterial. The question of jurisdiction of the subject-matter may be raised directly, either in the trial court or on appeal, at any stage of the proceedings.[2]

Want of jurisdiction of the subject-matter can not be waived, but may be raised at any time and in any manner directly or collaterally.[3]

The right to raise the question in the trial court is not confined to the pendency of the action. The jurisdiction may be contested, after judgment, by a motion to vacate the same, and, if it appears that the court had not jurisdiction, the judgment will be declared void, and set aside.[4]

The question of the jurisdiction of the lower court of the subject-matter is open to objection in the appellate court for the first time.[5] And a court which is competent, by its own constitution, to decide on its jurisdiction in a given case can determine that question at any time in the proceedings whenever it is made to appear to its satisfaction, either before or after judgment.[4]

The jurisdiction may be brought in question, collaterally, in many ways. Where action is brought upon a judgment, the question may be raised by demurrer where the defect appears on the face of the record, the same as in the original action, or by plea or answer.[6] Or, if the judgment is offered in evidence, for any purpose, it may,

[1] Fitzgerald, etc., Co. *v.* Fitzgerald, 2 Sup. Ct. Rep. 36.

[2] Doctor *v.* Hartman, 74 Ind. 221, 228; Cooley's Const. Lim., * p. 398.

[3] *Ante*, sec. 12; Cooley's Const. Lim., * p. 398; Doctor *v.* Hartman, 74 Ind. 221.

[4] Town of Wayne *v.* Caldwell, 47 N. W. Rep. 547.

[5] Poyser *v.* Murray, 6 Ind. 35; Doctor *v.* Hartman, 74 Ind. 221.

[6] 2 Bates's Pl. & Par. 876, 877; Rape *v.* Heaton, 9 Wis. 328; 76 Am. Dec. 269.

if it is subject to collateral attack, be objected to on the ground of want of jurisdiction, and the objection must be sustained.[1]

The question frequently arises as to what constitutes a direct attack upon the jurisdiction of the court. Where the objection is made by motion, demurrer, plea or answer, or in any other mode allowed by law, in the court in which the action is pending, and in that action, or in the appellate court, in the action, by motion, by assignment of error, or in any other mode allowed by law, the attack is direct.

So where a motion is made in the court in which the judgment is rendered, in the manner and within the time authorized by statute.[2]

It is held in some cases that an attack made upon a judgment by motion, not made under the statute or within the time limited, is a direct attack.[3] But it is believed that these cases do not state the law correctly. The decisions referred to are clearly inconsistent with the statement contained in the opinions that the attack is direct, as they all hold that on such a motion the judgment can only be attacked on the ground that it is void on its face.[4] This is equivalent to holding that the attack is collateral and not direct.

It is held that an action brought in the same court to set aside the judgment for want of jurisdiction is a direct attack.[5] But it makes no difference whether an action is brought in the same or another court, and the better rule seems to be that in either case the attack is collateral.[6]

[1] McMinn *v.* Whelan, 27 Cal. 310, 311; Rape *v.* Heaton, 9 Wis. 328, 332; 76 Am. Dec. 269.

[2] People *v.* Mullan, 65 Cal. 396; 4 Pac. Rep. 348; Reynolds *v.* Fleming, 30 Kan. 106; 1 Pac. Rep. 64.

[3] People *v.* Green, 74 Cal. 400; 16 Pac. Rep. 197; People *v.* Pearson, 76 Cal. 400; 18 Pac. Rep. 424.

[4] People *v.* Harrison, 84 Cal. 607; 24 Pac. Rep. 311.

[5] Newcomb *v.* Dewey, 27 Ia. 381, 387; Stone *v.* Kerry, 31 Ia. 582; Johnson *v.* Ramsey, 91 Ind. 189.

[6] Johnson *v.* Jones, 2 Neb. 126; Rogers *v.* Beauchamp, 102 Ind. 33; 1 N. E. Rep. 185; Exchange Bank *v.* Ault, 102 Ind. 322; 1 N. E. Rep. 562.

Where the question arises in some other action or proceeding, not brought directly to set aside the judgment, as for example where an action is brought on the judgment, whether in the court rendering it or in some other court, or where the judgment is offered in evidence in another action or proceeding, whether in the same or in another court, the attack is collateral.

The general rule is that the jurisdiction of a court of general jurisdiction will be presumed, and can not be collaterally attacked.[1] But there are exceptions to this rule. One of these exceptions is that where the court is one of general jurisdiction, but in the case in question was required to proceed in a special manner provided by statute, or where the mode of acquiring and exercising jurisdiction is special and statutory, and the party to be affected is a non-resident of the state in which the judgment is sought to be recovered, no such presumption will prevail, and the judgment is open to collateral attack.[2]

So the weight of authority seems to be that where an action is brought to recover upon a foreign judgment, including a judgment of another state, the jurisdiction of a court of general jurisdiction is open to attack, not only against the presumption in favor of its jurisdiction, but against a showing of jurisdiction appearing in the record.[2] But, as we have seen elsewhere, this proposition has not gone unchallenged, but is opposed by numerous authorities.[2]

And where the proceeding in a foreign court is one *in rem*, it may be shown not only that the subject-matter, generally, was not within the jurisdiction of the court, but that the particular property in controversy was not within such jurisdiction.[3]

The right to contest a judgment for want of jurisdiction is not confined to parties to the judgment. It extends to

[1] *Ante*, sec. 7; *post*, secs. 23, 25.

[2] *Post*, secs. 23, 25.

[3] Rose *v.* Himely, 4 Cranch, 241, 268.

others who have succeeded to their rights that are subject to the judgment if enforced.[1]

Where a judgment is void on its face, the court has inherent power to set it aside, upon a proper showing, and the statutes authorizing a motion to vacate within a limited time are usually held not to affect this power.[2] But the question sometimes arises whether, after a long space of time has intervened, the judgment can be vacated on motion, or whether it is not necessary to bring suit for that purpose. The right to obtain such relief by motion has been upheld;[3] but the better rule seems to be that no such motion can properly be entertained after the term, or where the time within which to move is fixed by law, after the time limited—and that, after that time, an action is necessary.[4] It must not be understood from this, however, that a court is bound, after the term, to enforce a void judgment. It has control over its process, and may decline to allow it to be used to execute such a judgment, and may arrest its process when issued thereon.[5]

An appearance by an attorney may be shown, in an action on a foreign judgment, to have been entered without authority, and the want of jurisdiction thus established.[6]

Whether this can be done in case of a domestic judgment is a disputed question upon which the authorities are conflicting. The weight of authority seems to be that the want of authority of the attorney to appear can not be shown collaterally.[7] But there are cases holding that there is no difference between foreign and domestic judg-

[1] People *v.* Mullan, 65 Cal. 396; 4 Pac. Rep. 348.

[2] People *v.* Greene, 74 Cal. 400; 16 Pac. Rep. 197.

[3] People *v.* Greene, 74 Cal. 400; 16 Pac. Rep. 197; People *v.* Mullan, 65 Cal. 396; 4 Pac. Rep. 348; People *v.* Pearson, 76 Cal. 400; 18 Pac. Rep. 424.

[4] Bell *v.* Thompson, 19 Cal. 706; People *v.* Goodhue, 80 Cal. 199; 22 Pac. Rep. 66; People *v.* Harrison, 84 Cal. 607; 24 Pac. Rep. 311.

[5] Chipman *v.* Bowman, 14 Cal. 158; Logan *v.* Hillegass, 16 Cal. 200; Bell *v.* Thompson, 19 Cal. 707.

[6] *Ante*, secs. 13, 20; *post*, secs. 23, 25; Harshey *v.* Blackmarr, 20 Ia. 161; 89 Am. Dec. 520.

[7] *Ante*, sec. 13; *post*, secs. 23, 25; Callen *v.* Ellison, 13 Ohio St. 446; 82 Am. Dec. 448, 454.

ments in this respect, and that in either case the judgment may be overthrown, even in a collateral proceeding, by proof that the appearance of the attorney was unauthorized.[1]

Generally, as we have shown in another place, the court in which the judgment was taken will relieve the party from the judgment upon his coming in and submitting to the jurisdiction, if a resident of the state, and absolutely if a non-resident.[2]

The authorities on the question growing out of the unauthorized appearance of attorneys have been fully considered in another place, and to undertake to discuss them in this connection would be mere repetition.[2]

23. How jurisdiction proved and disproved.—The question whether jurisdiction exists, or did exist in a given court, over the subject-matter, or of the persons of the parties, may arise in various ways. The attack upon its jurisdiction may be in a direct proceeding or collaterally. It may be presented to the court in which the action is pending, or the court to which the action is appealed, or to some other court. The manner in which the jurisdiction of a court may be attacked is considered elsewhere in this work.[3]

We are now to inquire how the jurisdiction of the court may be proved or disproved when attacked. Sometimes it is necessary to allege and prove the jurisdiction of a court where it is not attacked, as in case of an action brought upon the judgment of a court. And the proof necessary to establish such jurisdiction depends materially upon the character of the court, whether it is one of general or superior, or of inferior or special jurisdiction, and whether it is a domestic or foreign court. The difference between courts of general and of special jurisdiction

[1] *Ante*, sec. 13; *post*, secs. 23, 25; Harshey *v.* Blackmarr, 20 Ia. 161; 89 Am. Dec. 520, 523.

[2] *Ante*, sec. 13.

[3] *Ante*, sec. 22.

has been considered.[1] And the presumption that prevails in favor of the jurisdiction of courts of general and superior jurisdiction has also received attention.[2]

Whenever the jurisdiction of a court will be presumed this presumption alone establishes its jurisdiction, and the party asserting a right under its judgment need make no proof until this presumption is overcome by some proof on the other side.[3] But if the court is one whose jurisdiction will not be presumed, every fact necessary to show that it had jurisdiction must be proved.

If the question is as to the jurisdiction of the subject-matter the law will show of what the court has jurisdiction, and the pleadings in the cause will usually show whether the subject-matter in dispute is within that jurisdiction or not.

If the judgment or proceeding is of a court of a foreign country, or of another state in the United States, the law giving the court jurisdiction must, in the absence of any presumption in favor of its jurisdiction, be proved.[4]

If the court is one of general jurisdiction no such proof is necessary as its jurisdiction will be presumed whether the attempt to enforce the judgment is made in the state where the same was rendered or in a sister state.[5] But there is this difference, according to the weight of authority, between a domestic and a foreign judgment. As to the former the presumption in favor of jurisdiction is conclusive, but as to the latter it is only *prima facie* evidence of jurisdiction.[6]

[1] *Ante*, secs. 7, 20, 22. [2] *Post*, sec. 25.

[3] Bruckman *v.* Taussig, 7 Colo. 561; 5 Pac. Rep. 152.

[4] Rape *v.* Heaton, 9 Wis. 328; 76 Am. Dec. 269; Sheldon *v.* Hopkins, 7 Wend. 435; Thomas *v.* Robinson, 3 Wend. 268.

[5] *Ante*, sec. 22; *post*, sec. 25; Freeman on Judg., secs. 452, 453, 518; Bruckman *v.* Taussig, 7 Col. 561; 5 Pac. Rep. 152.

[6] *Ante*, sec. 22; *post*, sec. 25; Coit *v.* Haven, 30 Conn. 190; 79 Am. Dec. 244.

In Coit *v.* Haven, *supra*, the court said: "We do not understand that, upon the authorities at home or abroad, there is any contrariety of opinion, that a domestic judgment rendered by a court of general jurisdiction, where no want of jurisdiction is apparent on the

If the court is not a foreign court, the law defining its jurisdiction need not be proved unless it depends upon a private statute, as the court before whom the question is raised will take judicial notice of all general statutes of the state.[1]

If the law of a foreign state is not proved, the general rule is that it will be presumed to be the same as the law of the state in which the controvery is pending, and, if the court in question would have jurisdiction under that law, no proof of its jurisdiction is necessary.[2] In such case it would devolve upon the party attacking the jurisdiction to prove the law of the foreign state, in order to show that the court had not jurisdiction.

If certain steps are necessary to be taken in order to give the court jurisdiction of either the subject-matter or of the person, it must be proved, to establish the jurisdiction, that all of the steps have been taken in the manner and within the time prescribed, unless the court is such that the facts necessary to give such jurisdiction will be presumed.[3]

If it will be presumed in favor of the jurisdiction of the court that the steps necessary to give it jurisdiction have been taken, the party asserting such jurisdiction may safely rely upon this presumption. But the presumption

record, can not be collaterally attacked. If it be a foreign judgment, or the judgment of a court of limited jurisdiction, or the want of jurisdiction is apparent on the record, it can be collaterally attacked; for then the jurisdiction is not presumed, or the presumption is repelled by the record itself, and the judgment is an absolute nullity if the want of jurisdiction in fact exists. This subject, with its various distinctions, was carefully considered and passed upon by this court in the late cases of Sears *v.* Terry, 26 Conn. 273, and Sanford *v.* Sanford, 28 Id. 6; and in the less recent ones of Pearce *v.* Olney, 20 Id. 544; Wood *v.* Watkinson, 17 Id. 500 (44 Am. Dec. 562); and Aldrich *v.* Kinney, 4 Id. 380 (10 Am. Dec. 151). We think this point is no longer open to dispute. See likewise 2 Am. Lead. Cas. (ed. 1857), 812; Cook *v.* Darling, 18 Pick. 393; Granger *v.* Clark, 22 Me. 128; and Burgess *v.* Tweedy, 16 Conn. 39."

[1] Stultz *v.* The State, 65 Ind. 492.

[2] Rape *v.* Heaton, 9 Wis. 328; 76 Am. Dec. 269; Walsh *v.* Dart, 12 Wis. 635.

[3] *Ante*, sec. 22; *post*, sec. 25.

of jurisdiction in case of a foreign judgment is not conclusive, and the party denying the jurisdiction may overcome it by proving that the necessary steps, or any of them, have not been taken as required by law. Where the presumption of jurisdiction prevails, the want of jurisdiction is a defense.[1]

A distinction is made between the statutes and the constitutions of other states, in some of the decisions, it being held that the courts will take judicial notice of the provisions of the constitution of a sister state, and that a court created thereby is one of general jurisdiction.[2]

If the court is one of general jurisdiction, but is not made so by constitutional provision, the fact that it is a court of general jurisdiction must be proved in order to get the benefit of the presumption in favor of the jurisdiction of such courts.[3]

There is a marked difference, in some of the states, between the manner of alleging jurisdiction in a court and the mode of proving the same fact. This results from statutory provisions authorizing a general allegation of jurisdiction in lieu of specific allegations of the facts showing jurisdiction. But these provisions relate to the pleadings and not to the evidence. The general allegation of jurisdiction can only be established by proof of the facts necessary to show jurisdiction.

Jurisdiction of the person may be proved by the summons or other notice provided for and the return of the officer showing proper service, or the appearance of the defendant, or, where constructive service is allowed, by the production of the necessary affidavit or other showing required, the notice given, and proof of its publication.[4]

The general rule is that in case of courts of inferior jurisdiction their jurisdiction must be proved by the record,

[1] Shumway *v.* Stillman, 4 Cow. (N. Y.) 292; 15 Am. Dec. 374; Porter *v.* Bronson, 29 How. Pr. 292; Eastern Township Bank *v.* Beebe, 53 Vt. 177.

[2] Butcher *v.* The Bank of Brownsville, 2 Kan. 70, 81; 83 Am. Dec. 446.

[3] McLaughlin *v.* Nichols, 13 Abb. Pr. 244.

[4] Knowles *v.* Gas-Light & Coke Co., 86 U. S. 58; Freeman on Judg., secs. 519–523; Baldwin *v.* Webster, 68 Ind. 133, 135.

and can not be established in any other way.[1] But in some of the decided cases this rule is limited to such jurisdictional *facts* as the law directs to be set forth in its records.[2] When not required to be set out in the record, they may be proved by other evidence.[3]

A mere recital in the record, tending to show jurisdiction of the person, is controlled by the return of the proper officer, which is itself a part of the record and the best evidence.[4]

The rule that the finding of the court as to jurisdictional facts is conclusive is confined to matters *in pais* to be established by evidence, and does not extend to matters of law or such facts as must appear by the record.[5]

Thus it is held that, where certain matters must appear in a petition to an inferior court in order to give jurisdiction, the finding by the court that the necessary facts were alleged in the petition is not conclusive or even *prima facie* evidence of jurisdiction where the petition itself shows that it did not contain the required allegations.[6] And this doctrine has been extended so far as to hold that where the law requires that a petition shall be filed signed by a majority or some other certain number of persons having a certain qualification, and, the petition being signed by the requisite number, the court finds that they are possessed of the required qualification, the finding is not conclusive.[7]

There is a clear distinction between the finding of a fact necessary to give jurisdiction and a decision that the court

[1] *Ante*, sec. 22; *post*, sec. 25; Freeman on Judg., sec. 518.

[2] Freeman on Judg., sec. 518; Jolley *v.* Foltz, 34 Cal. 321; Van Deusen *v.* Sweet, 51 N. Y. 379, 385; People *v.* Hager, 49 Cal. 229.

[3] Van Deusen *v.* Sweet, 51 N. Y. 378.

[4] Freeman on Judg., sec. 519; Lowe *v.* Alexander, 15 Cal. 296.

[5] In re Grove Street, 61 Cal. 438, 447; Levy *v.* Superior Court, 66 Cal. 292; 5 Pac. Rep. 353.

[6] In re Grove Street, 61 Cal. 438, 447; Craig *v.* Town of Andes, 93 N. Y. 405.

[7] Kahn *v.* Board of Supervisors, 79 Cal. 388, 396; 21 Pac. Rep. 849; In re Madera Irrigation District, 92 Cal. 296, 331; 28 Pac. Rep. 272.

has jurisdiction, as a matter of law, and the latter is not binding.[1]

It is provided by the federal constitution that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state."[2] And such faith and credit will be given to the judicial proceedings of a court of another state when such proceedings are properly authenticated as provided by law.[3] But before such faith and credit can be given to a record, it must first be shown that it was made by a court having jurisdiction to make it. As we have seen, the presumption in favor of the jurisdiction of the court may be overcome by proof showing that it had not jurisdiction. But the provision of the federal constitution has the effect of placing the judgments of the courts of another state, in this country, on a more favorable footing than the judgments of foreign states or countries, in that they are conclusively binding upon the parties in a sister state, on the merits, and may be enforced by suit in the courts of the latter.[4] But, as has been said, in order to the enforcement of such a judgment in another state, it must appear that the court had jurisdiction of the subject-matter and of the parties. The question as to the manner in which, or by what evidence, it is competent to prove jurisdiction or a want of jurisdiction in such cases, is one of great difficulty, and one upon which the authorities are numerous and conflicting. Of course a want of jurisdiction may always be proved by the record of the court if it discloses the fact.[5] And it is held that where the jurisdiction of a court, whether it be a court of general or of inferior jurisdiction, depends upon a fact which it is required to ascertain and determine by its decision, its finding of the

[1] Wanzer *v.* Howland, 10 Wis. 7.

[2] Const. U. S., Art. IV, sec. 1. [3] Rev. Stat. U. S., sec. 905.

[4] Bissell *v.* Briggs, 9 Mass. 461; 6 Am. Dec. 88; Thompson *v.* Whitman, 85 U. S. 457; Mills *v.* Duryee, 7 Cranch, 481; McElmoyle *v.* Cohen, 13 Pet. 312; Shumway *v.* Stillman, 6 Wend. 447; Wilson *v.* Jackson, 10 Mo. 209.

[5] Hahn *v.* Kelly, 34 Cal. 402; 94 Am. Dec. 742.

fact, showing its jurisdiction, is conclusive on collateral attack.[1]

In some of the cases this is placed upon the ground that the action of the court, in ascertaining and deciding the fact necessary to give it jurisdiction, is itself an exercise of jurisdiction, and therefore its decision upon this point, like any other, is conclusive against a collateral attack.[2] Some of the cases go still further, and hold that where the record of a foreign court shows it has jurisdiction, whether such jurisdiction depends upon the finding of a fact or not, the record is conclusive against a collateral attack.[3] But the better reason, as well as the weight of authority, is certainly against this proposition.[4]

[1] Wells' Jur., sec. 61; Evansville, etc., R. R. Co. *v.* City of Evansville, 15 Ind. 395, 421; Dowell *v.* Lahr, 97 Ind. 146, 153; Otis *v.* De Boer, 116 Ind. 531; 19 N. E. Rep. 317; Lessee of Fowler *v.* Whiteman, 2 Ohio St. 271, 286; Lessee of Grignon *v.* Astor, 2 How. 319, 339; Sargent *v.* State Bank of Indiana, 12 How. 371, 384; People *v.* City of Rochester, 21 Barb. 656, 670; Freeman on Judg., secs. 522, 523; Ex parte Sternes, 77 Cal. 156, 162; 19 Pac. Rep. 275; Muncey *v.* Joest, 74 Ind. 409, 412; Porter *v.* Stout, 73 Ind. 3.

[2] Lessee of Grignon *v.* Astor, 2 How. 319, 339.

[3] Mills *v.* Duryee, 7 Cranch, 481; Lapham *v.* Briggs, 27 Vt. 26, 34; Wescott *v.* Brown, 13 Ind. 83; Wetherill *v.* Stillman, 65 Pa. St. 105, 113; Welch *v.* Sykes, 3 Gil. (Ga.) 197; 44 Am. Dec. 689; Hall *v.* Williams, 23 Mass. 232, 237; 17 Am. Dec. 356; Zepp *v.* Hager, 70 Ill. 223; Wilcox *v.* Kassick, 2 Mich. 165; Watson *v* Balch, 30 Kan. 753; 1 Pac. Rep. 777.

[4] Bissell *v.* Briggs, 9 Mass. 462; 6 Am. Dec. 88; Rape *v.* Heaton, 9 Wis. 328, 332; 76 Am. Dec. 269; Thompson *v.* Whitman, 85 U. S. 457; Knowles *v.* Gas Light & Coke Co., 86 U. S. 58; Carleton *v.* Bickford, 13 Gray, 591; 74 Am. Dec. 652; Hoffman *v.* Hoffman, 46 N. Y. 30; 7 Am. Rep. 299; People *v.* Dowell, 25 Mich. 247; 12 Am. Rep. 260; Harshey *v.* Blackmarr, 20 Ia. 161; 89 Am. Dec. 520; Marx *v.* Fore, 51 Mo. 69; 11 Am. Rep. 432; Shumway *v.* Stillman, 6 Wend. 447; McMinn *v.* Whelan, 27 Cal. 300, 314; Norwood *v.* Cobb, 24 Tex. 551; Wilson *v.* Jackson, 10 Mo. 209; Starbuck *v.* Murray, 5 Wend. 148; 21 Am. Dec. 172; Commonwealth *v.* Green, 17 Mass. 514, 545; Gleason *v.* Dodd, 45 Mass. 333, 335; Pennoyer *v.* Neff, 95 U. S. 714, 729; D'Arcy *v.* Ketchum, 11 How. 165, 173; Pollard *v.* Baldwin, 22 Ia. 328; Adams *v.* Washington, etc., R. R. Co., 10 N. Y. 328, 332; Ferguson *v.* Crawford, 70 N. Y. 253; 26 Am. Rep. 589; Watson *v.* Balch, 30 Kan. 753; 1 Pac. Rep. 777; Litowich *v.* Litowich, 19 Kan. 451, 455; 27 Am. Rep. 145; Mastin *v.* Gray, 19 Kan. 458; 27 Am. Rep. 149; Rose *v.* Himely, 4 Cranch, 241, 268; Porter *v.* Bronson, 29 How. Pr. 292; Moulin *v.* Insurance Co., 24 N. J. Law, 222.

It is a most remarkable doctrine that a court that has no jurisdiction to proceed in a cause can, nevertheless, make a false record, binding and conclusive upon parties not before it, by which its jurisdiction that does not exist, is established beyond dispute. The evident tendency of the later decisions is to extend the right to contest and disprove the jurisdiction of courts, in opposition to recitals in the records, many of the cases holding that this may be done even in the case of a domestic judgment.[1]

[1] Mastin *v.* Gray, 19 Kan. 458, 462, 465; 27 Am. Rep. 149; Ferguson *v.* Crawford, 70 N. Y. 253; 26 Am. Rep. 589; Porter *v.* Bronson, 29 How. Pr. 292; State *v.* Hudson, 37 Ind. 198.

The question as to the effect of recitals in a record was fully discussed in the case of Rape *v.* Heaton, 9 Wis. 328 (76 Am. Dec. 269), in which the cases decided up to that time were carefully reviewed. In that case the court said: "Assuming the record offered to be a sufficient record of a judgment upon which to sustain an action, the case presents several questions of much interest, which were discussed on the argument. Ever since the case of Bissell *v.* Briggs, 9 Mass. 462, it has been held that the judgments of other states, to which full faith and credit are required to be given, by the constitution of the United States, are only those in which the courts rendering them had jurisdiction of the suits and parties, and such jurisdiction has been allowed to be questioned by the party against whom such judgments are set up.

"But there is great conflict and uncertainty among the cases as to the extent of this right. Some courts hold the doctrine laid down by the supreme court of New York, in Starbuck *v.* Murray, 5 Wend. 148, that the defendant may contradict the express allegations of the alleged record, as to jurisdictional facts, on the ground that, if there was no jurisdiction, then, as to him, it is no record. Other cases entirely dissent from this rule, and some have criticized it with some severity. Thus, in Lincoln *v.* Tower, 2 McLean, 473, Justice McLean denies its correctness, and contends that, if the averments in the record as to jurisdictional facts may be denied, there is no reason why any other facts alleged may not as well be denied. And in Wilson *v.* Jackson, 10 Missouri Rep. 334, the court, in commenting on the same case, asks: 'Is there any thing monstrous in the proposition that a record should be conclusive on the question of jurisdiction, any more than it should be conclusive of other facts equally fatal to the interests of the party to be affected by the judgment?' Now, it seems to me that this question may readily be answered in the affirmative. And that it is obviously much more monstrous to say that a party shall be concluded by an averment in a record that he was served with process, from showing that he never was so

It is held by the Supreme Court of the United States

served, and that the court never had any jurisdiction over him, than to say, such jurisdiction being undisputed, that he shall be bound by the other averments of the record. Because the reason upon which the conclusiveness of records rests is that the parties have been served, have had an opportunity to defend their interests, and see to it that the record is truly made up. And, when this is so, there is nothing 'monstrous' at all in holding them bound by it. But, where this is not so, where the party has, in fact, never been served, never had an opportunity to defend, to hold him absolutely concluded by a false averment in the record to the contrary, would seem to be the very essence of injustice.

"These very cases admit that, if the want of jurisdiction appears on the record itself, then the party is not bound by it, but may disregard all its averments. So the Missouri court, and others, as in Hall et al. *v.* Williams et al., 6 Pick. 232, admit that, where the record is silent as to the jurisdictional facts, the party may aver and prove that there was no jurisdiction, and thus destroy the effect of the record. This can only be upon the ground that, if there was no jurisdiction, then the pretended record is no record, and the doctrine of conclusiveness does not apply to it. But this want of jurisdiction, if it can be established, would have the same effect upon the record which averred the facts necessary to show jurisdiction, as upon one silent as to them. To say, therefore, that, when a record avers such facts, a party shall not be permitted to deny them, because that is contradicting a record, does seem, as Judge Marcy says, to be assuming the whole question, for the question, whether it is a record or not, is the very thing put in issue. A party would probably not be precluded from showing that a paper offered against him as a record was a forgery. But, suppose it contained an allegation that it was not a forgery, would he then be precluded? Manifestly not, because, on the theory that it was a forgery, the allegation, in itself that it was not would fall with the rest of it. So of these averments as to jurisdictional facts. If there was no jurisdiction, they fall with the rest of the record. And to give such averments effect as records, in determining the very question whether they are entitled to such effect, would seem to be a method of determining a question about as unsatisfactory as could well be devised.

"Where the record is silent as to the jurisdictional facts, and the party avers that he was never served, and never appeared, etc., and the court allows him to prove that, for the purpose of showing a want of jurisdiction, it necessarily suspends its judgment on the question whether the alleged record is really a record, until the question of jurisdiction is determined. And I can see no reason why the same course should not be pursued where the alleged record avers the jurisdictional facts, and why the court should not suspend its judgment on those allegations as well as the others. And there is no other possible way of avoiding that extreme of injustice, the holding of a party bound by a record of a

that it is competent to show, where a foreign judgment is

proceeding of which he never had notice, or opportunity to defend himself. And it is no answer to say that to allow such proof is to contradict a record, for this is assuming the whole issue, inasmuch as if there was no jurisdiction; then, according to all the authorities, these allegations are not a record. And to give them that effect, in determining the very question whether they are entitled to that effect or not, is a rule of decision the logic or justice of which I am totally unable to perceive. It is allowing that which is not, in truth, a record to make itself one by a false allegation that it is one.

"It is jurisdiction only that gives to a record its character of conclusiveness. It is, therefore, logically impossible, whatever it may be legally, to make a record without jurisdiction that shall be conclusive as to jurisdictional averments or any other. When it is conceded, therefore, that, if the record is silent on the subject, a want of jurisdiction may be shown to defeat it, I can not comprehend how, even though it contain the necessary averments, the court can refuse to inquire on the ground that it is estopped by a record, for, by its own concession, if the inquiry was made, it might appear that the pretended record was an entire nullity. I can see, therefore, no reason for any distinction as to the right of the party to inquire into the jurisdiction, between cases where the record is silent as to, and those where it avers, the facts necessary to show it. And the learned writer of the notes to the 'American Leading Cases,' 2d vol., 788, intimates that there is 'no middle ground between throwing the whole question of jurisdiction open to examination,' and holding the records conclusive in all cases, as well as to jurisdiction as to every thing else.

"Which of these rules is the true one is a question of vital interest. I confess that to my own mind the rule laid down in Starbuck *v.* Murray seems so, if the question is to be decided upon principle. How it would be held upon the weight of authority, is much more doubtful.

"When the case of Mills *v.* Duryee, 7 Cranch, 481, was first decided, it was very generally supposed to have settled the question against the right to inquire into the jurisdiction in any case. Thus it was so considered in Commonwealth *v.* Green, 17 Mass. 545. But afterward, in Hall *v.* Williams, 6 Pick. 233, before cited, that court said that in its former decision it had 'yielded a painful deference' to the case of Mills *v.* Duryee, without close examination, and on reviewing the matter, held that the jurisdiction might be inquired into, where the record was silent on the subject. Though the court said, if it appeared by the record that the defendant had notice or appeared in defense, they were 'inclined to think it could not be gainsayed.' But in Ewer *v.* Coffin, 1 Cush. 23, this remark is called a '*dictum*' of Chief-Justice Parker; and this case, as well as that of Gleason *v.* Dodd, 4 Met. 333, indicates a decided leaning in favor of the right of inquiring into the jurisdiction. This right seems essential for the purpose of preventing the courts of one state from assuming a jurisdiction over the citizens of another, who

pleaded, not only that the constitution of the court is

have never been within its actual jurisdiction, or where they could be legally served with its process. But if it be once established that an averment in a record, showing legal service, can never be controverted, such an unwarrantable jurisdiction can easily be assumed and exercised. For any state which desires to bind the citizens of other states by litigation in its own courts, may readily provide that notice may be sent to them in the states where they reside; but that its record shall, by a fiction, be so made up as to show personal service within its limits. Then, when the record was sent to the state where the party resided, to be enforced, he would be bound by it, and could not aver to the contrary. The tendency of decisions in the state courts has therefore been to restrict the operation of the decision in Mills *v.* Duryee to the narrowest possible limits, and to assert as far as possible the right to inquire into the jurisdiction. There are, however, very many authorities which hold that where the record expressly avers the facts necessary to show jurisdiction, it can not be controverted. They are most of them referred to in 2 Am. Leading Cases, and the subject is very fairly presented in the case of Wilcox et al. *v.* Kassick, 2 Mich. 165."

And the subject was before the Supreme Court of the United States, in Thompson *v.* Whitman, 85 U. S. 457, where the law is declared as follows: "The act of congress above referred to, which was passed 26th of May, 1790 (1 Stat. at L. 122), after providing for the mode of authenticating the acts, records, and judicial proceedings of the states, declares, 'and the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from whence the said records are or shall be taken.' It has been supposed that this act, in connection with the constitutional provision which it was intended to carry out, had the effect of rendering the judgments of each state equivalent to domestic judgments in every other state, or at least of giving to them in every other state the same effect, in all respects, which they have in the state where they are rendered. And the language of this court in Mills *v.* Duryee, 7 Cranch, 484, seemed to give countenance to this idea. The court in that case held that the act gave to the judgment of each state the same conclusive effect, as records, in all the states, as they had at home; and that *nil debet* could not be pleaded to an action brought thereon in another state. This decision has never been departed from in relation to the general effect of such judgments where the questions raised were not questions of jurisdiction. But where the jurisdiction of the court which rendered the judgment has been assailed, quite a different view has prevailed. Justice Story, who pronounced the judgment in Mills *v.* Duryee, in his Commentary on the Constitution, after stating the general doctrine established by that case with regard to the conclusive effect of judgments of one state in every other state, adds: 'But this does not prevent an inquiry into the jurisdiction of the court in which the

such that it had not jurisdiction of the subject-matter

original judgment was given, to pronounce it, or the right of the state itself to exercise authority over the person or the subject-matter. The constitution did not mean to confer (upon the states) a new power or jurisdiction, but simply to regulate the effect of the acknowledged jurisdiction over persons and things within their territory.' Sec. 1313. In the Commentary on the Conflict of Laws, sec. 609, substantially the same remarks are repeated, with this addition: 'It (the constitution) did not make the judgments of other states domestic judgments to all intents and purposes, but only gave a general validity, faith and credit to them as evidence. No execution can issue upon such judgments without a new suit in the tribunals of other states. And they enjoy not the right of priority or lien which they have in the state where they are pronounced, but that only which the *lex fori* gives to them by its own laws in their character of foreign judgments.' Many cases in the state courts are referred to by Justice Story in support of this view. Chancellor Kent expresses the same doctrine in nearly the same words, in a note to his Commentaries, vol. 1, p. 281. 'The doctrine in Mills *v.* Duryee,' says he, 'is to be taken with the qualification that in all instances the jurisdiction of the court rendering the judgment may be inquired into, and the plea of *nil debet* will allow the defendant to show that the court had no jurisdiction over his person. It is only when the jurisdiction of the court in another state is not impeached, either as to the subject-matter or the person, that the record of the judgment is entitled to full faith and credit. The court must have had jurisdiction not only of the cause, but of the parties, and in that case the judgment is final and conclusive.' The learned commentator adds, however, this qualifying remark: 'A special plea in bar of a suit on a judgment in another state, to be valid, must deny, by positive averments, every fact which would go to show that the court in another state had jurisdiction of the person, or of the subject-matter.' See, also, 2 Kent's Com. 95, note, and cases cited.

"In the case of Hampton *v.* McConnel, 3 Wheat. 234, this court reiterated the doctrine of Mills *v.* Duryee, that 'the judgment of a state court should have the same credit, validity, and effect in every other court of the United States which it had in the state courts where it was pronounced; and that whatever pleas would be good to a suit therein in such state, and none others, could be pleaded in any court in the United States.' But in the subsequent case of McElmoyle *v.* Cohen, 13 Pet. 312, the court explained that, neither in Mills *v.* Duryee, nor in Hampton *v.* McConnel, was it intended to exclude pleas of avoidance and satisfaction, such as payment, statute of limitations, etc.; or pleas denying the jurisdiction of the court in which the judgment was given; and quoted, with approbation, the remark of Justice Story, that 'the constitution did not mean to confer a new power of jurisdiction, but simply to regulate the effect of the acknowledged jurisdiction over persons and things within the state.'

"The case of Landes *v.* Brant, 10 How. 348, has been quoted to show

generally, but that the particular property in controversy

that a judgment can not be attacked in a collateral proceeding. There a judgment relied on by the defendant was rendered in the Territory of Louisiana in 1808, and the objection to it was that no return appeared upon the summons, and the defendant was proved to have been absent in Mexico at the time; but the judgment commenced in the usual form—'And now at this day come the parties aforesaid by their attorneys,' etc. The court pertinently remarked (p. 371) that the defendant may have left behind counsel to defend suits brought against him in his absence, but that, if the recital was false and the judgment voidable for want of notice, it should have been set aside by *audita querela* or motion in the usual way, and could not be impeached collaterally. Here it is evident the proof failed to show want of jurisdiction. The party assailing the judgment should have shown that the counsel who appeared were not employed by the defendant, according to the doctrine held in the cases of Shumway *v.* Stillman, 6 Wend. 453; Aldrich *v.* Kinney, 4 Conn. 380, and Price *v.* Ward, 1 Dutch. 225. The remark of the court that the judgment could not be attacked in a collateral proceeding was unnecessary to the decision, and was, in effect, overruled by the subsequent cases of D'Arcy *v.* Ketchum and Webster *v.* Reid. D'Arcy *v.* Ketchum, 11 How. 165, was an action in the circuit court of the United States for Louisiana, brought on a judgment rendered in New York under a local statute, against two defendants, only one of whom was served with process, the other being a resident of Louisiana. In that case it was held by this court that the judgment was void as to the defendant not served, and that the law of New York could not make it valid outside of that state; that the constitutional provisions and act of congress, giving full faith, credit, and effect to the judgments of each state in every other state, do not refer to judgments rendered by a court having no jurisdiction of the parties; that the mischief intended to be remedied was not only the inconvenience of retrying a cause which had once been fairly tried by a competent tribunal, but also the uncertainty and confusion that prevailed in England and this country as to the credit and effect which should be given to foreign judgments, some courts holding that they should be conclusive of the matters adjudged, and others that they should be regarded as only *prima facie* binding. But this uncertainty and confusion related only to valid judgments; that is, to judgments rendered in a cause in which the court had jurisdiction of the parties and cause, or (as might have been added) in proceedings *in rem*, where the court had jurisdiction of the *res*. No effect was ever given by any court to a judgment rendered by a tribunal which had not such jurisdiction. 'The international law, as it existed among the states in 1790,' say the court, 'was that a judgment rendered in one state, assuming to bind the person of a citizen of another, was void within the foreign state, when the defendant had not been served with process or voluntarily made defense, because neither the legislative jurisdiction, nor that of courts of justice, had binding force.

was not within its jurisdiction.[1] It is also held, in some

Subject to this established principle, congress also legislated; and the question is, whether it was intended to overthrow this principle and to declare a new rule, which would bind the citizens of one state to the laws of another. There was no evil in this part of the existing law, and no remedy called for, and in our opinion congress did not intend to overthrow the old rule by the enactment that such faith and credit should be given to records of judgments as they had in the states where made.' P. 176.

"In the subsequent case of Webster *v.* Reid, 11 How. 437, the plaintiff claimed, by virtue of a sale made under judgments in behalf of one Johnson and one Brigham against 'The Owners of Half-breed Lands Lying in Lee County,' Iowa Territory, in pursuance of a law of the territory. The defendant offered to prove that no service had ever been made upon any person in the suits in which the judgments were rendered, and no notice by publication as required by the act. This court held that, as there was no service of process, the judgments were nullities. Perhaps it appeared on the face of the judgments in that case that no service was made; but the court held that the defendant was entitled to prove that no notice was given, and that none was published.

"In Harris *v.* Hardeman, 14 How. 334, which was a writ of error to a judgment held void by the court for want of service of process on the defendant, the subject now under consideration was gone over by Mr. Justice Daniel at some length, and several cases in the state courts were cited and approved, which held that a judgment may be attacked in a collateral proceeding by showing that the court had no jurisdiction of the person, or, in proceedings *in rem*, no jurisdiction of the thing. Among other cases quoted, were those of Borden *v.* Fitch, 15 Johns. 141, and Starbuck *v.* Murray, 5 Wend. 156; and from the latter the following remarks were quoted with apparent approval: 'But it is contended that, if other matter may be pleaded by the defendant, he is estopped from asserting any thing against the allegation contained in the record. It imports perfect verity, it is said, and the parties to it can not be heard to impeach it. It appears to me that this proposition assumes the very fact to be established, which is the only question in issue. For what purpose does the defendant question the jurisdiction of the court? Solely to show that its proceedings and judgment are void, and, therefore, the supposed record is, in truth, no record. . . . The plaintiffs, in effect, declare to the defendant—the paper declared on is a record, because it says you appeared, and you appeared because the paper is a record.' This is reasoning in a circle.

"The subject is adverted to in several subsequent cases in this court, and generally, if not universally, in terms implying acquiescence in the doctrine stated in D'Arcy *v.* Ketchum, *supra*. Thus, in Christmas *v.*

[1] Rose *v.* Himely, 4 Cranch, 241, 268.

of the cases, that, where the court is one of general

Russell, 5 Wall. 290, where the court decided that fraud in obtaining a judgment in another state is a good ground of defense to an action on the judgment, it was distinctly stated (p. 305) in the opinion, that such judgments are open to inquiry as to the jurisdiction of the court, and notice to the defendant. And in a number of cases, in which was questioned the jurisdiction of a court, whether of the same or another state, over the general subject-matter in which the particular case adjudicated was embraced, this court has maintained the same general language. Thus, in Elliott *v.* Peirsol, 1 Pet. 328, 340, it was held that the Circuit Court of the United States for the District of Kentucky, might question the jurisdiction of a county court of that state to order a certificate of acknowledgment to be corrected; and for want of such jurisdiction to regard the order as void. Justice Trimble, delivering the opinion of this court in that case, said: 'Where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. But, if it act without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void.'

"The same views were repeated in U. S. *v.* Arredondo, 6 Pet. 691; Voorhees *v.* Bk., 10 Pet. 475; Wilcox *v.* Jackson, 13 Pet. 511; Shriver *v.* Lynn, 2 How. 59, 60; Hickey *v.* Stewart, 3 How. 762, and Williamson *v.* Berry, 8 How. 540. In the latter case the authorities are reviewed, and the court say: 'The jurisdiction of any court exercising authority over a subject may be inquired into in every other court when the proceedings in the former are relied upon and brought before the latter by a party claiming the benefit of such proceedings;' and 'the rule prevails whether the decree or judgment has been given in a court of admiralty, chancery, ecclesiastical court, or court of common law, or whether the point ruled has arisen under the laws of nations, the practice in chancery, or the municipal laws of states.'

"But it must be admitted that no decision has ever been made on the precise point involved in the case before us, in which evidence was admitted to contradict the record as to jurisdictional facts asserted therein, and especially as to facts stated to have been passed upon by the court.

"But if it is once conceded that the validity of a judgment may be attacked collaterally by evidence showing that the court had no jurisdiction, it is not perceived how any allegation contained in the record itself, however strongly made, can affect the right so to question it. The very object of the evidence is to invalidate the paper as a record. If that can be successfully done, no statements contained therein have any force. If any such statements could be used to prevent inquiry, a slight form of words might always be adopted so as effectually to nullify the right of such inquiry. Recitals of this kind must be regarded like asseverations of good faith in a deed, which avail nothing if the instru-

jurisdiction its want of jurisdiction, when brought

ment is shown to be fraudulent. The records of the domestic tribunals of England, and some of the states, it is true, are held to import absolute verity as well in relation to jurisdictional as to other facts, in all collateral proceedings. Public policy and the dignity of the courts are supposed to require that no averment shall be admitted to contradict the record. But, as we have seen, that rule has no extra-territorial force.

"It may be observed that no courts have more decidedly affirmed the doctrine that want of jurisdiction may be shown by proof to invalidate the judgments of the courts of other states than have the courts of New Jersey. The subject was examined, and the doctrine affirmed, after a careful review of the cases, in the case of Moulin *v.* Ins. Co., in 4 Zeb. 222, and again in the same case in 1 Dutch. p. 57, and in Price *v.* Ward, 1 Dutch. 225, and as lately as November, 1870, in the case of Mackay *v.* Gordon, 34 N. J. L. 286. The judgment of Chief Justice Beasley in the last case is an able exposition of the law. It was a case similar to that of D'Arcy *v.* Ketchum (*supra*), being a judgment rendered in New York under the statutes of that state, before referred to, against two persons, one of whom was not served with process. 'Every independent government,' says the Chief Justice, 'is at liberty to prescribe its own methods of judicial process, and to declare by what forms parties shall be brought before its tribunals. But, in the exercise of this power, no government, if it desires extra-territorial recognition of its acts, can violate those rights which are universally esteemed fundamental and essential to society. Thus, a judgment by the court of a state against a citizen of such state, in his absence, and without any notice, express or implied, would, it is presumed, be regarded in every external jurisdiction as absolutely void and unenforceable. Such would certainly be the case if such judgment was as rendered against the citizen of a foreign state.'

"On the whole, we think it clear that the jurisdiction of the court by which a judgment is rendered in any state may be questioned in a collateral proceeding in another state, notwithstanding the provision of the 4th article of the constitution and the law of 1790, and notwithstanding the averments contained in the record of the judgment itself."

"In Massachusetts the doctrine has been thus stated: "Soon after the promulgation of these provisions of the constitution and law of the United States, great diversity of judicial opinion arose, as to their true construction. By some it was contended that congress did intend to declare, not only what should be deemed conclusive proof of records of the judgments of one state in the courts of another, but their legal effect. They considered that the effect of this law was to put them in all respects on the same footing of domestic judgments, so that to an action of debt on such judgment, no plea would be admissible, but that which denied the existence of the judgment, and nothing was put in is-

collaterally in question, can only be disproved by

sue, but that fact, and that to be tried by the court by an inspection of the transcript of the record, authenticated in the manner required by the act of congress. Noble *v.* Gold, 1 Mass. 410, note. By others it was held that the act did nothing more than declare that the record of the judgment of another state, thus authenticated, should be conclusive evidence that such judgment was passed, by a court of such state, of the parties between whom, the nature of the action, and the other facts expressly stated in it, leaving the effect of such judgment to be ascertained by the rules of the common law. At common law it seemed to be well understood that the legal effect of such foreign judgment was this: that it was *prima facie* evidence of debt, for which an action of debt, or *indebitatus assumpsit* as upon implied promise, would lie, but like all other *prima facie* evidence, it might be controlled by proof, showing that the judgment was irregular or erroneous, that the defendant had no opportunity to defend, or was not summoned, or that he had good ground of defense; or, in short, by proof tending to outweigh the evidence arising from such judgment. Such were the grounds of decision, in the earliest case fully reported in this commonwealth. Bartlet *v.* Knight, 1 Mass. 401. The same views seem to have been adopted in other states. It is not, however, my intention to go into a general review of the cases, but merely to allude to the progress of judicial opinion on the subject.

"In Bissell *v.* Briggs, 9 Mass. 462, the subject underwent great consideration, and an elaborate opinion was pronounced by Parsons, C. J. The ground taken was, that the judgment of another state would be conclusive of the merits, provided the court by whom it was rendered had jurisdiction of the subject-matter, and of the parties; but if it appeared to be rendered by a court not having jurisdiction of the parties —as against one not an inhabitant within the state, not arrested or summoned, or for any cause not amenable to its process, or not actually brought within it by proper service, it would not be binding. As a necessary consequence of this doctrine, it followed that it is competent for a defendant, sued on such judgment, under a proper plea, to put in issue every fact necessary to try the question of such jurisdiction. In this opinion Mr. Justice Sewall did not concur; adhering to the opinion which he had before expressed in Bartlet *v.* Knight.

"About the same time the case of Mills *v.* Duryea, 7 Cranch, 481, came before the supreme court of the United States, in which it was supposed they went further than the case of Bissell *v.* Briggs, and held that the judgment of another state was in all respects conclusive, like that of a domestic judgment. But a careful consideration of that case will show that no question was there raised as to the right of the defendant, in an action of debt on such judgment, to contest the actual jurisdiction of the court in which the judgment was rendered; and the point whether it was open to such inquiry was not before the court. On the contrary, Mr. Justice Story, in giving the opinion of the court, says,

facts or circumstances appearing on the face of the record.[1]

that in the case then before them, it appeared that 'the defendant had full notice of the suit, for he was arrested and gave bail, and it is beyond all doubt that the judgment of the supreme court of New York was conclusive upon the parties in that state. It must, therefore, be conclusive here also.' The point of jurisdiction was not judicially determined; and, therefore, that case did not go further in holding such judgments conclusive than that of Bissell *v.* Briggs. See Hampton *v.* M'Connel, 3 Wheat. 234, and the reporter's note. M'Elmoyle *v.* Cohen, 13 Pet. 312; 1 Kent. Com. (4th ed.) 261, note.

In this commonwealth, the last case, in which the subject has been discussed, former decisions reviewed, modified and reconciled with each other, and the whole doctrine placed upon intelligible and practicable principles, is that of Hall *v.* Williams, 6 Pick. 232. This case, after a full discussion and review of all the authorities, fully recognizes the principle laid down in Bissell *v.* Briggs, to the effect that the judgments of other states may be declared on as records and evidences of debt; that on a proper plea, the jurisdiction of the courts rendering them may be put in issue, but not the merits of the judgments. In this case, the court concluded by saying, that 'the full faith any credit, required to be given in each state to the judicial proceedings of other states, will prevent the admission of any evidence to contradict the facts, which show a jurisdiction, if such appear on the record.' This last remark we consider, taken in connection with the subject-matter, as applying to all such facts as tend to show jurisdiction of the court over the person; such as that he was arrested and gave bail, or was personally summoned; indicating his actual presence in the state at the time of the commencement of the action, and of course subject to its jurisdiction, or other facts of the like nature. But if the jurisdiction was assumed, upon certain constructive notice, such as the nominal attachment of property, with a notice by order of court published in a gazette, or by summoning a trustee, or other similar mode, such judgment would be no further conclusive, than as it may bind the property attached, or the effects in the hands of the trustee; they being with the reach of the process of the court, and subject to its jurisdiction. A record, merely reciting one's having appeared by attorney, was held not to be contradicted, by a plea, alleging that he never was within the jurisdiction of the court, was never served with process, and never did appear. 6 Pick. 246. It therefore follows that the conclusiveness of judgments, as to matters tending to show that court had jurisdiction, does not extend to such recitals, but only to specific averments of fact, such as an arrest, personal service, or personal appearance. But such general recital, if evidence at all, is *prima facie* only, may be traversed, and the contrary shown by proof." Gleason *v.* Dodd, 45 Mass. 335. See also Eastern Township Bank *v.* Beebe, 53 Vt. 177; Moulin *v.* Insurance Co., 24 N. J. Law, 222.

[1] Hahn *v.* Kelly, 34 Cal. 402; 94 Am. Dec. 742; Carpentier *v.* City of

But this doctrine, so far as it applies to foreign judgments, is directly opposed to the decisions above referred to, holding that want of jurisdiction may be proved by other evidence, not only where the record of the court is silent on the subject, but where the record affirmatively shows that the court had jurisdiction. It would be rather a strange complication to hold that proof can be made against an express recital of jurisdiction in the record, but can not be made against a mere presumption in favor of such jurisdiction.

It is held that where a defendant was a resident of the state in which the judgment was rendered, at the time of

Oakland, 30 Cal. 439, 445; Galpin *v.* Page, 1 Saw. (U. S. C. C.) 318; McCauley *v.* Fulton, 44 Cal. 355; Lapham *v.* Briggs, 27 Vt. 26; Quivey *v.* Porter, 37 Cal. 462; Vassault *v.* Austin, 36 Cal. 691; Sharp *v.* Brunnings, 35 Cal. 528, 533; Sharp *v.* Daugney, 33 Cal. 505, 512.

In Hahn *v.* Kelly, 34 Cal. 402; 94 Am. Dec. 742, the supreme court of California used this language: "Where the judgment of a court of superior jurisdiction is offered in evidence, during the progress of a trial, it may be attacked by the opposite side upon the ground that the court by which it was rendered had no jurisdiction, either of the subject-matter or of the person of the defendant, or both; for any judgment of any court is absolutely void, if it appear that there was a want of jurisdiction in either respect. In support of this attack, however, no facts or circumstances can be shown, or relied upon, which do not appear upon the face of what, under the law as it read at the date of the judgment, constituted the record, or, to adopt the nomenclature of our code of procedure, the judgment roll; for the record of a court of superior jurisdiction imports absolute verity, and can not, therefore, be collaterally impeached from without. In this respect the rule may be stated too broadly in McMinn *v.* Whelan, 27 Cal. 314; but it is correctly stated in the subsequent case of Carpentier *v.* The City of Oakland, 30 Cal. 446. Our language in the former case implies that a want of jurisdiction may be shown *aliunde*, but no such question was involved in that case, and what was said upon that subject must be considered dictum. Furthermore, it is a matter of no consequence whether the jurisdiction of the court appears affirmatively upon the judgment roll or not, for if it does not it will be conclusively presumed. These are elementary principles. (Carpentier *v.* City of Oakland, 30 Cal. 447; Forbes *v.* Hyde, 31 Cal. 342; Colt *v.* Haven, 30 Conn. 198.) So the only question which we are called upon to answer is: Does the judgment roll, in the case of Horace Hawes *v.* William Carey Jones, show upon its face that the court from which it comes did not have jurisdiction of the person of the defendant Jones?"

its rendition, he can not acquire the right to defeat it by removing into another state and attacking it there.[1]

Again it is held that if the recitals of a judgment are such as to render it conclusive upon the parties to it, in the state in which it is rendered, the same faith and credit must be accorded to it in the courts of another state.[2] But this again is opposed to the doctrine, that seems to be thoroughly established by the later cases, that the jurisdiction of the court over the subject-matter, and of the person, is always open to attack, in another state, even against the recitals in the record, and that the judgment, when sued upon in another state, is only conclusive upon the merits of the controversy, and not upon the jurisdiction of the court rendering the judgment. To hold that if the recitals in a record are conclusive in the state where the judgment is rendered it must be given the same force in the courts of another state, is to remove all distinction between domestic and foreign judgments as affecting the several states of the United States.[3]

A different rule prevails where the judgment is rendered by a court of the state in which the jurisdiction is brought in question. In such cases the recitals are not only conclusive, but in the absence of any showing in the record, on the subject, it will be conclusively presumed that the court had jurisdiction.[4] In other words, the jurisdiction of a court of general jurisdiction, of the state in which the judgment is brought in question collaterally, can only be attacked by matters appearing on the face of the record.[5] But this conclusive presumption must be confined to the proceedings of domestic courts of general jurisdiction, and limited to persons within the territorial limits of the court, and to cases in which the court is exercising its

[1] Brainard *v.* Fowler, 119 Mass. 265.

[2] Lapham *v.* Briggs, 27 Vt. 26; Wetherill *v.* Stillman, 65 Pa. St. 105, 113; Mastin *v.* Gray, 19 Kan. 458, 466; 27 Am. Rep. 149.

[3] Commonwealth *v.* Green, 17 Mass. 514, 545.

[4] *Ante*, sec. 22; *post*, sec. 25.

[5] Coit *v.* Haven, 30 Conn. 190; Hahn *v.* Kelly, 34 Cal. 402; 94 Am. Dec. 742; People *v.* Harrison, 84 Cal. 607; 24 Pac. Rep. 311; Lee *v.* Rogers, 2 Saw. 549, 567; Moore *v.* Martin, 38 Cal. 428.

general powers according to the general course of proceeding in such court. If the court is one of general jurisdiction, but the powers conferred are exercised in a special manner, no presumption prevails in favor of its jurisdiction where its record is silent on the subject, nor will any recitals in its record be binding.[1]

It is held in California, that where the action is one affecting the *status* of the parties, or an action *in rem.*, the the recitals in the judgment roll showing constructive service are conclusive, and that papers or documents on file in the case, but not parts of the judgment roll, can not be looked to or considered in determining the question of jurisdiction.[2] This may be so, as to domestic judgments, but as respects the judgments of courts of other states, the authorities are strongly against it, as we have seen. And it would not be true under the later and best considered cases, even in case of a domestic judgment, if the judgment recovered were a personal judgment. So far as its own citizens are concerned a state may, undoubtedly, provide how the jurisdiction of its courts may be proved, and the effect of the evidence, as has sometimes been done.[3] But it can not do so as affecting citizens of another state, not brought within the jurisdiction of its courts by personal service.

Of course, where the attack upon a judgment is direct, the recitals in the record are never conclusive.[4]

Where a court is one of inferior or special jurisdiction, the facts necessary to prove its jurisdiction, either of the subject-matter or of the person, must appear on the face

[1] *Ante*, sec. 22; *post*, sec. 25; Galpin *v.* Page, 18 Wall. 350; Coit *v.* Haven, 30 Conn. 190; 79 Am. Dec. 244; Pennoyer *v.* Neff, 95 U. S. 714, 729; D'Arcy *v.* Ketchum, 11 How. 165, 173; Galpin *v.* Page, 3 Saw. 93, 102. See, on this subject, the case of Cooper *v.* Sunderland, 3 Ia. 114 (66 Am. Dec. 52), in which the earlier cases are cited and reviewed. See also 1 Smith's Lead. Cases, 5th ed., note, 820, 821, 824, 842.

[2] In re Newman, 75 Cal. 213, 219; 16 Pac. Rep. 887; Sichler *v.* Look, 93 Cal. 600; 29 Pac. Rep. 220.

[3] Branson *v.* Caruthers, 49 Cal. 380; Eitel *v.* Foote, 39 Cal. 439.

[4] McKinley *v.* Tuttle, 42 Cal. 570, 577.

of its records, and can not be proved in any other way.[1] And there are cases holding, directly, not only that recitals in the record of a domestic court of inferior or special jurisdiction are not conclusive, but that they are not even *prima facie* evidence of such jurisdiction;[2] and that the recitals in the record of a domestic court of general jurisdiction are not conclusive.[3]

Where the record of a court shows upon its face that it had no jurisdiction, this is conclusive. But there is a clear distinction between a showing that the defendant in an action was not served at all and a showing of a defective service. In the latter case the judgment is erroneous, but it is not void, and can not be collaterally attacked on that ground.[4]

It will be seen that upon almost every question considered in this section the authorities are conflicting. There seems to be no question of jurisprudence upon which the courts have so widely differed as upon the many and important questions growing out of the jurisdiction of courts. This condition of the decided cases renders it impossible to lay down fixed rules upon which the student or the lawyer can rely with any degree of safety. The proposition stated may be fully adopted and supported by the authorities in one state and wholly denied and repudiated in another, and whether the rule relied upon can be maintained will sometimes depend upon whether a case is pending in a state or a federal court. Not only so, but on many of the questions the cases are so evenly divided, apparently, as to render it very much a question of opinion as to where the weight of authority rests. For this reason, the only safe course is to look to the latest case that the court before whom the action is pending is bound

[1] *Ante*, sec. 22; *post*, sec. 25; Frees *v.* Ford, 6 N. Y. 176; Galpin *v.* Page, 18 Wall. 350; Pennoyer *v.* Neff, 95 U. S. 714, 729.

[2] People *v.* The Warden, etc., 100 N. Y. 20, 26; 2 N. E. Rep. 870; Adams *v.* Washington, etc., R. R. Co., 10 N. Y. 328, 332.

[3] People *v.* The Warden, etc., 100 N. Y. 20, 26; 2 N. E. Rep. 870; Ferguson *v.* Crawford, 70 N. Y. 253; 26 Am. Rep. 589.

[4] Ballinger *v.* Tarbell, 16 Ia. 491; 85 Am. Dec. 527.

to follow. Notwithstanding this condition of the authorities, however, it is believed that the following propositions are supported by reason and the weight of authority:

1. The jurisdiction of a court of general jurisdiction, whether domestic or foreign, when proceeding within its general powers, against one situated within its territorial jurisdiction, and according to the general course of proceeding in such court in acquiring and exercising its jurisdiction, will be presumed and need not appear on the face of its proceedings.

2. This presumption, in case of foreign judgments, including the judgments of another state in this country, is not conclusive on collateral attack, but may be disproved by evidence *dehors* the record.

3. The jurisdiction of a court of inferior or special jurisdiction must be proved by matters appearing on the face of its record, and will not be presumed, and can not be proved in any other way.

4. No presumption will be indulged in favor of the proceedings of a foreign court of general jurisdiction, including a court of another state in this country, which, in the given case, must acquire jurisdiction in a special manner provided by statute, or where it exercises its jurisdiction, when acquired, in a special statutory manner. Its jurisdiction, under such circumstances, must be proved as the jurisdiction of courts of wholly inferior or special jurisdiction are required to be proved.

5. If the record of a court, whether of general or inferior or special jurisdiction, shows upon its face that it had not jurisdiction, this is conclusive every-where and under all circumstances.

6. Where the jurisdiction of a court, no matter what the nature of its jurisdiction may be, is directly brought in question, its authority to act may be attacked and disproved, no matter what may appear on the face of its records.

7. Where the jurisdiction of a court, whether of general or inferior or special jurisdiction, depends upon a fact which

such court is required to ascertain and determine from evidence outside of its records, its finding of such fact is conclusive as against a collateral attack, not only in the state where the judgment is rendered, but in every other state.

8. In case of a domestic judgment, the finding of the court that it has jurisdiction, and the recitals in its records to that effect are conclusive, whether its jurisdiction depends upon a fact or facts to be ascertained and determined or not.

9. The finding of jurisdiction by a court of another state, whether of general or limited jurisdiction, where jurisdiction does not depend upon a fact or facts to be ascertained and determined, is *prima facie* evidence, only, of such jurisdiction, and the recitals in its records showing that it had jurisdiction, are not conclusive.

The fact is not overlooked, in this connection, that in some of the cases it is firmly held that there is no distinction between a domestic judgment and a judgment of another state as to the effect and weight to be given to the recitals in the record.[1]

10. The finding of its own jurisdiction by a court of general jurisdiction exercising special statutory powers, or acquiring jurisdiction in a special statutory way, and the recitals in its records to that effect, are placed upon the same footing as the findings and recitals of courts of inferior or special jurisdiction.

[1] See cases cited above in this section, and particularly the case of Mastin *v.* Gray, 19 Kan. 458, 466; 27 Am. Rep. 149, where it is said, after a review of the authorities: "It is now settled beyond all controversy that judgments from sister states, wherever they can be used, are entitled to the same faith and credit as domestic judgments." But in this statement the supreme court of Kansas has undoubtedly fallen into an error. Not only is it not settled beyond controversy that the judgments of sister states stand upon the same footing as domestic judgments, and must receive the same faith and credit, but the great weight of the decided cases, at least of the later cases, as we have seen, make a very material distinction between them respecting this question of jurisdiction, holding that full faith and credit can only be accorded to them when their jurisdiction is established, and that such jurisdiction can not be conclusively established by recitals in the record.

24. How jurisdiction may be lost, taken away, or suspended.—A court may be deprived of all or part of its jurisdiction by law. If, however, a court is invested with jurisdiction by the constitution, such jurisdiction can not be taken away, changed, or modified by statute.[1] It can only be taken away, modified, or changed by a change of the constitution. And, so long as a court is allowed to exist and to exercise general jurisdiction, there are certain inherent powers that necessarily belong to every court of that class of which it can not be deprived by the legislative department of government.[2] But these inherent powers are subject to regulation by legislative enactment.[3]

A court can not be divested of its proper jurisdiction by agreement of the parties to an action.[4]

As a general rule, a court and its jurisdiction are creatures of statutory law and subject to be taken away at the will of the law making power. But the jurisdiction of superior courts can not be so taken away, except by express words or necessary implication.[5]

Where exclusive jurisdiction is vested in one court, by statute, and the same jurisdiction is by statute subsequently conferred upon another court without making such jurisdiction conclusive, the jurisdiction of the former court is not taken away, but is made concurrent with the latter. And, where jurisdiction is conferred upon a court by the constitution, but is not made exclusive, the same jurisdiction may be conferred upon another court, thus making the jurisdiction in the two courts concurrent.[6] But this can not be done where the jurisdiction vested in the first court, by the constitution, is exclusive.[6]

To confer exclusive jurisdiction on one court, deprives

[1] *Post*, sec. 29; Wilson *v.* Roach, 4 Cal. 366; The People *v.* Nichols, 79 N. Y. 582; Landers *v.* Staten Island R. R. Co., 53 N. Y. 450; Popfinger *v.* Yutte, 102 N. Y. 38; 6 N. E. Rep. 259; Hutkoff *v.* Demorest, 103 N. Y. 377; 8 N. E. Rep. 899; State *v.* Butt, 25 Fla. 258; 5 Sou. Rep. 597.

[2] *Post*, sec. 27; Elliott's App. Pro., sec. 6.

[3] *Post*, sec. 27; Fox *v.* Meacham, 6 Neb. 530; Elliott's App. Pro., sec. 6.

[4] Muldrow *v.* Norris, 2 Cal. 74; 56 Am. Dec. 313.

[5] 12 Am. & Eng. Enc. of Law, p. 303, note 7; Wells' Jur., sec. 73.

[6] 1 Works' Ind. Prac. & Pl., sec. 6.

all other courts of such jurisdiction, whether exclusive or concurrent, conferred by statute.[1]

Sometimes the power of the legislature is limited by the constitution, in the creation of courts, to inferior courts, or to courts inferior to a certain named court. Under such a constitutional limitation, only such inferior courts can be created and the jurisdiction of existing courts conferred upon them.[2]

The power of a territorial legislature, in the creation of courts and conferring jurisdiction upon them, is limited by the organic act under which the territory was organized.[3]

The division of a county by the creation of a new county, out of a part of the territory of the old, does not deprive the courts of the old county of jurisdiction over real estate in the new county where the jurisdiction had attached before the division.[4]

The jurisdiction of a court can not be transferred to and vested in any other tribunal or person, for example, in the judge of the court.[5]

The repeal of a statute from which a court derives its jurisdiction deprives it of power to proceed in cases pending before it at the time of such repeal.[6]

It is the purpose of this section to consider more particularly how a court, vested with jurisdiction by law, may, after having obtained jurisdiction in a given case, lose such jurisdiction by acts of its own or of the parties to the action. This may be done by some failure of the court to do some act necessary to perpetuate or continue

[1] 1 Wells' Jur., sec. 74; Whitaker *v.* Daly, 78 Ia. 31; 42 N. W. Rep. 569; Stubbs *v.* The State, 39 Tex. 571; Perrott *v.* Pierce, 75 Mich. 578; 42 N. W. Rep. 1002; Green *v.* Superior Court, 78 Cal. 556; 21 Pac. Rep. 307.

[2] Ex parte Lothrop, 118 U. S. 113; 6 Sup. Ct. Rep. 984; Green *v.* Superior Court, 78 Cal. 556; 21 Pac. Rep. 307; *ante*, sec. 17.

[3] Perris *v.* Higley, 20 Wall. 375; Chumasero *v.* Potts, 2 Mon. 242.

[4] Tolman *v.* Smith, 85 Cal. 280; 24 Pac. Rep. 743.

[5] In re Cleveland, 51 N. J. L. 311; 17 Atl. Rep. 772.

[6] Hunt *v.* Jennings, 5 Blkf. (Ind.) 195; 33 Am. Dec. 465; Stephenson *v.* Doe, 8 Blkf. (Ind.) 508; 46 Am. Dec. 489.

its jurisdiction over a cause, by appeal, writ of error, change of venue, removal of the cause to another court, by raising an issue not within the jurisdiction of the court, in actions *in rem.*, by losing the custody of the property, and by exhausting its jurisdiction.[1]

a. *By some failure of the court to act in time.* It is sometimes provided that courts of inferior jurisdiction shall take certain steps in a cause within a limited time after the doing of some other act, and the question frequently arises whether, upon a failure to act within the time specified, the court thereby loses jurisdiction to proceed further in the cause. If a court of inferior jurisdiction is required to perform a certain act, for example, to render judgment within a limited time, the performance of the act, after the time limited, is usually held to be of no effect.[2] If, however, the cause has been tried by jury, and a verdict returned, it is held that the entry of the judgment in accordance with the verdict is a ministerial and not a judicial act, and may be done after the time limited.[3]

But on this point the authorities are not uniform. In some of the cases the terms of the statute are strictly adhered to, and the failure to render judgment forthwith upon a verdict of a jury has been held to deprive the court of jurisdiction to proceed further in the action.[4] And this has been held to require the court to render the judgment on a legal holiday.[5]

In other cases the statute is more liberally construed

[1] 12 Am. & Eng. Enc. of Law, 303.

[2] Stephens *v.* Santee, 49 N. Y. 35 39; Fox *v.* Meacham, 6 Neb. 530, 534; Watson *v.* Davis, 19 Wend. 371; Hall *v.* Tuttle, 6 Hill (N. Y.), 38; 40 Am. Dec. 382; Conwell *v.* Kuykendall, 29 Kan. 707; Brady *v.* Taber, 29 Mich. 199; Dunlap *v.* Robinson, 12 Ohio St. 530.

[3] Stephens *v.* Santee, 49 N. Y. 35, 39; Hall *v.* Tuttle, 6 Hill (N. Y.), 38; 40 Am. Dec. 382; Lynch *v.* Kelly, 41 Cal. 232; Montgomery *v.* Superior Court, 68 Cal. 411; 9 Pac. Rep. 720.

[4] McNamara *v.* Spees, 25 Wis. 539; Hull *v.* Mallory, 56 Wis. 355; 14 N. W. Rep. 374; Smith *v.* Bahr, 62 Wis. 244; 22 N. W. Rep. 438.

[5] Perkins *v.* Jones, 28 Wis. 243.

with reference to what constitutes immediate action on the part of the court.[1]

There is a clear distinction between the rendition and the entry of a judgment. If the court has actually rendered its judgment within the time limited the same may be entered at a subsequent time, the entry of the judgment being a ministerial and not a judicial act.[2]

To render a judgment is to form the same in the mind of the court and publicly announce it. To enter the judgment is to write it in the proper record.[3]

Where an inferior court is required by statute, upon adjournment of a cause, to adjourn the same to a time and place certain, an adjournment without specifying the time or place is held to deprive the court of jurisdiction.[4] And the record of the court must show by the proper entries the time and place to which the case is adjourned.[5]

A second adjournment, not authorized by law, will deprive the court of jurisdiction.[6] And in some of the states the failure of a plaintiff to appear within a certain time and prosecute the action operates as a discontinuance and deprives the court of jurisdiction.[7]

It has been held that where, upon a disagreement of a jury, a justice of the peace is authorized to summon another jury to appear at a time fixed, not more than three days distant, and the justice issues such summons for a time beyond that provided for, the court does not thereby lose jurisdiction of the subject-matter, and that the appearance of the parties at the time fixed waived any question as to the jurisdiction of the person.[8]

[1] Huff *v.* Babbott, 14 Neb. 150; 15 N. W. Rep. 230.

[2] Fish *v.* Emerson, 44 N. Y. 378; Hall *v.* Tuttle, 6 Hill (N. Y.), 38; 40 Am. Dec. 382; Conwell *v.* Kuykendall, 29 Kan. 707.

[3] Conwell *v.* Kuydendall, 29 Kan. 707, 710.

[4] Crandall *v.* Bacon, 20 Wis. 671; 91 Am. Dec. 451; Freeman on Judg., sec. 526; Grace *v.* Mitchell, 31 Wis. 533; 11 Am. Rep. 613.

[5] Brahmstead *v.* Ward, 44 Wis. 591.

[6] Grace *v.* Mitchell, 31 Wis. 533; 11 Am. Rep. 613.

[7] Brady *v.* Taber, 29 Mich. 199.

[8] Wheeler & Wilson Mfg. Co. *v.* Donahoe, 49 Ark. 318; 5 S. W. Rep. 342.

A discontinuance may result from an agreement, acquiesced in by the court, to suspend proceedings with a view to submit the matter to another tribunal of concurrent jurisdiction, without any formal order of dismissal.[1]

A justice loses jurisdiction by calling a case for trial at a different place from that named in the summons and by trying the case in a place forbidden by law.[2]

b. *By appeal or writ of error.* An appeal or writ of error transfers jurisdiction from the lower to the appellate court and deprives the former, during the pendency of the appeal, of all power to proceed further in the matter involved in the appeal.[3] But it is held-that where the appeat is in the nature of a writ of error, for the correction of errors which may have intervened in the trial of the cause in the court below, and for an adjudication upon the question whether the judgment appealed from should be affirmed, reversed, or modified, the appeal does not vacate or suspend the judgment appealed from, and the court below has jurisdiction to enforce the same.[4]

In some of the states it is held that an appeal suspends the operation of a judgment for all purposes.[5] And it is held that the judgment appealed from can not be used as evidence between the parties.[6]

A bond to stay procedings is usually required. If no such bond is given the judgment may be enforced notwithstanding the appeal. And even where such a bond is given it is generally held that it merely suspends the right to enforce the judgment, but leaves it, until annulled or reversed, binding upon the parties upon all questions

[1] People *v.* Andrews, 57 Super. Ct. Rep. (N. Y.) 591.

[2] Newcomb *v.* Town of Trempealeau, 24 Wis. 459.

[3] In re May, 6 N. Y. Sup. 357; 53 Hun, 632; Keyser *v.* Farr, 105 U. S. 265; Stone *v.* Spillman, 16 Tex. 432; Levi *v.* Karrack, 15 Ia. 444; 1 Black on Judg., sec. 243.

[4] Bank of North Am. *v.* Wheeler, 28 Conn. 433; 73 Am. Dec. 683; Cain *v.* Williams, 16 Nev. 426; Taylor *v.* Shew, 39 Cal. 536; 2 Am. Rep. 478; Freeman on Judg., sec. 328.

[5] Freeman on Judg., sec. 328; McGarrohan *v.* Maxwell, 28 Cal. 91; People *v.* Treadwell, 66 Cal. 400.

[6] Woodbury *v.* Bowman, 13 Cal. 635; Murray *v.* Green, 64 Cal. 363.

directly decided.[1] Therefore, a judgment appealed from may be pleaded in bar of another action for the same cause.[2]

Where the appeal is to a court in which the cause must be tried *de novo*, and not for the correction of errors, the appeal does not merely suspend the right to enforce the judgment. By such an appeal the judgment of the lower court is vacated and set aside.[3]

Where an appeal can only be taken upon an order of the court allowing the same, and such order is made, the jurisdiction is not divested by making the order of allowance; and until the steps necessary to perfect the appeal are taken the case is under the control of the court, and it may, during the term, vacate the order allowing the appeal.[4] But where the order of allowance is followed by the steps necessary to perfect the appeal, the jurisdiction of the lower court is at an end, and the order of allowance can not be vacated by that court.[5]

c. *By change of venue.* Provision is usually made for changing the venue from one court to another for specified causes. When such a change is taken, the jurisdiction is thereby taken from the court first having cognizance of the case and vested in the court to which the case is removed.[6]

The court from which the cause is removed has power to perfect the record of the proceedings before it, if defective, so that the case may be properly presented to the court to which it is sent; but it can take no steps toward the further progress of the case unless authority to do so is given by law.[6]

[1] Freeman on Judg., sec. 328; Nill *v.* Comparet, 16 Ind. 107; 79 Am. Dec. 411; Burton *v.* Burton, 28 Ind. 342; Sage *v.* Harpending, 49 Barb. 166.

[2] Harris *v.* Hammond 18 How. Pr. 123.

[3] Freeman on Judg., sec. 328; Bank of North America *v.* Wheeler, 28 Conn. 433; 73 Am. Dec. 683; Cain *v.* Williams, 16 Nev. 426, 430; 2 Black on Judg., sec. 960.

[4] Goddard *v.* Ordway, 101 U. S. 745; Keyser *v.* Farr, 105 U. S. 265.

[5] Draper *v.* Davis, 102 U. S. 370; Keyser *v.* Farr, 105 U. S. 265.

[6] State *v.* Reid, 1 Dev. & Bat. L. (N. Car.) 377; 28 Am. Dec. 572.

Under the general rule that the records of a court are subject to be changed by it, during the term, an order for a change of venue may be changed by the court at any time during the term, until the change of venue is perfected by filing the necessary papers in the court to which the case is sent.[1] This is on the ground that it is not the order for the change that divests the court of jurisdiction, but the transmission of the papers to the court to which the change is taken.

Sometimes, where the cause for the change of venue does not affect the judge of the court, authority is given by statute to make up the issues, or take other steps in the case, not inconsistent with the rights of the party asking for the change; and, such authority being given, the court in which the case is pending may proceed with the cause to the extent authorized, and then make the order of removal.[2]

It is usual for the statute authorizing a change of venue to require the party applying therefor to pay the costs, or the costs of the change. Under such a provision, the jurisdiction of the court is not divested either by the filing of the necessary affidavit or by the order of removal. In order to perfect the change, and transfer the jurisdiction from one court to the other, the costs must be paid, or, if other conditions are imposed, they must be complied with. If not, the jurisdiction remains where it was, and the court must proceed with the cause.[3]

Where the statute authorizes a change of venue by stipulation, the jurisdiction of one court may be taken away, and the same vested in the other, by the agreement of the parties; and where the question is one of jurisdiction of the person, the court to which the action is sent

[1] People *v.* Zane, 105 Ill. 662; Atlantic, etc., Coal Co. *v.* Maryland Coal Co., 64 Md. 302; 1 Atl. Rep. 878.

[2] Works' Ind. Prac. & Pl., sec. 1263; Dawson *v.* Vaughan, 42 Ind. 395; Risher *v.* Morgan, 56 Ind. 172.

[3] 2 Works' Ind. Prac. & Pl., secs. 1263, 1264; Buchanan *v.* Port, 5 Ind. 264; Fawcett *v.* The State, 71 Ind. 590.

may be vested with jurisdiction by consent, or by waiver, resulting from an appearance without objection.[1]

d. *By removal of causes.* Provision is made for the removal of causes from the state to the federal courts in certain cases.[2] When the petition and bond required by the statute are filed, it is the duty of the state court to transfer the cause to the federal court. And whether the state court makes the order of transfer or not, a compliance with the statute divests it of jurisdiction and vests such jurisdiction in the federal court.[3]

e. *By raising an issue not within the jurisdiction of the court.* In most of the states, provision is made to the effect that where the title to real estate is put in issue before a justice of the peace, the cause shall be certified by the justice to the proper court for further determination. Under these statutes, it is uniformly held that whenever the title to real estate is put in issue by the proper pleadings, or is raised by the evidence at the trial, whether disclosed by the pleadings or not, the jurisdiction of the court ceases at once, and any act of the court, except to certify the case to the higher court, is absolutely void.[4] If no provision is made for the transfer of the cause to a court having jurisdiction, the case should be dismissed upon the issue of title being presented.[5]

The fact that the title to land comes incidentally in question will not oust the court of jurisdiction. It must be a direct issue in the case.[6] And it is not sufficient to show that title *may* become an issue in the case. It must appear, either by the pleading or the evidence, that it will

[1] Carpenter *v.* Shepardson, 43 Wis. 406; 2 Works' Ind. Prac. & Pl., sec. 1263; Bennett *v.* The State, 3 Ind. 167.

[2] Rev. Stat. U. S., sec. 639.

[3] Works' Rem. of Causes, sec. 8; Dillon's Rem. of Causes, sec. 75; Railroad Co. *v.* Koontz, 104 U. S. 5; Carpenter *v.* New York, etc., R. R. Co., 11 How. Pr. 481.

[4] Murry *v.* Burris, 6 Dak. 170; 42 N. W. Rep. 25; Tordsen *v.* Gimmer, 37 Minn. 211; 34 N. W. Rep. 20; Meier *v.* Thiemann, 90 Mo. 433; 2 S. W. Rep. 435.

[5] State *v.* Stenner, 50 N. J. Law, 59; 11 Atl. Rep. 131.

[6] Wells' Jur., sec. 79, p. 67.

be necessary for the court to determine the question of title in its decision.[1]

If a plaintiff brings an action, knowing that his demand necessarily involves a question of title, his action should be dismissed at his cost and not certified up.[1]

f. *In actions in rem., by losing the custody of the property or failing to give notice.* As the jurisdiction of the court in actions *in rem.* is acquired by a levy upon the property, or some equivalent act by which the property is taken into its custody,[2] so the court loses its jurisdiction by surrendering, or otherwise losing the custody of the property.[3]

It has been shown elsewhere that in actions *in rem.* it is necessary, in order to render the jurisdiction of the court effectual, that notice be given to the parties interested, or to the public generally, as the case may require.[4] If, therefore, the court obtains jurisdiction of the property by seizing and taking it into its custody, but notice is not given within the time required by law, its jurisdiction is lost.[5]

g. *Suspended between terms of court and when judges not present.* It has been shown that a court can only act as such when regularly convened at the time and in the place provided by law.[6] It follows, necessarily, that during the intervals between terms of court the jurisdiction of the court is suspended, and no judicial act, that can only be done by the court, can be performed by the judge or judges composing the court when not properly assembled as such.[7] And if, during the term, the number of judges necessary to make a duly organized court are not present, the functions of the court are suspended until the requisite number appears. But it has been held that the calling of one of the members of the court from the bench to the witness stand, in the case on trial before the court, thus leaving less than the requisite number,

[1] Ohse *v.* Bruss, 45 Wis. 442.
[2] *Ante*, sec. 14. [3] Waples' Attach. 312. [4] *Ante*, sec. 14.
[5] Miller *v.* Babcock, 29 Mich. 526; Waples' Pro. In Rem, sec. 64, p. 88.
[6] *Ante*, secs. 1, 19. [7] *Ante*, sec. 19.

does not deprive the court of jurisdiction.[1] And a failure of the court to convene for one day, during the term, although the court has regularly adjourned to that day, does not deprive it of jurisdiction for the term where it meets the following day and proceeds with the business of the court.[2] It is otherwise when the court fails to convene at the beginning of the term.[3]

h. *By exhausting its jurisdiction.* Cases occur in which a court may, in the proper exercise of its jurisdiction, render one of two alternative judgments. Where this power exists, the rendition of one of the alternative judgments, for example, where one of two penalties may be inflicted for the commission of a crime, exhausts the jurisdiction of the court, and its power is at an end. It can not subsequently impose the other alternative penalty upon the party accused.[4]

As a general rule, the jurisdiction of a court, once properly acquired, will not be divested by any act of the parties, or change of facts, or the condition of the parties, or the subject-matter in the particular case.[5] The question of jurisdiction relates to the time the action is brought, except where such jurisdiction is claimed to have been terminated in some mode recognized by law. Therefore, if the residence of the parties is such, at the time the suit is brought, as to give a federal court jurisdiction, such jurisdiction will not be ousted by a subsequent change of residence of any of the parties.[6]

25. Presumptions in favor of jurisdiction.—The general rule in respect of presumptions affecting jurisdiction is that every thing will be presumed to be within the jurisdiction of courts of general and superior jurisdiction,

[1] People *v.* Dohring, 59 N. Y. 374; 17 Am. Rep. 349.
[2] People *v.* Sullivan, 115 N. Y. 185; 21 N. E. Rep. 1039.
[3] *Ante*, secs. 1, 19.
[4] Lange *v.* Benedict, 48 How. Pr. 465; Ex parte Lange, 85 U. S. 163.
[5] Wells' Jur., sec. 79.
[6] Mollan *v.* Torrance, 9 Wheat. 537.

and nothing will be presumed to be within the jurisdiction of courts of inferior or special jurisdiction.[1]

The effort has been made to distinguish these different classes of courts.[2] The means by which courts of special or inferior powers may obtain jurisdiction in a particular case has also received attention.[3] It must be borne in mind that there is a very material distinction between a court of inferior jurisdiction and one exercising special jurisdiction. Of course, a court having special jurisdiction only, is a court of inferior jurisdiction. But a court of general and superior jurisdiction may be invested with special powers, and, so far as it exercises such special jurisdiction, it is a court of inferior powers, and its acts must be tested and proved accordingly.[4]

Jurisdiction, whether exercised by a court of general or of inferior jurisdiction, may be special in its nature because such jurisdiction must be obtained in a special way, or because it must, after being obtained, be exercised in a special mode.[5] Therefore, the general rule that every thing will be presumed to be within the jurisdiction of a court of general jurisdiction must be limited to such things as fall within the general scope of its powers.[6] And, where exclusive jurisdiction of a subject-matter is given to a class of tribunals, it will not be presumed that a court, not belonging to such class, has jurisdiction over such subject-matter, although the court is one of general jurisdiction.[7] But this can only be so where it affirmatively appears from the record that jurisdiction of the general sub-

[1] Galpin *v.* Page, 18 Wall. 350; Freeman on Judg., secs. 124, 517; 12 Am. & Eng. Enc. of Law, 271; Harvey *v.* Tyler, 2 Wall. 328. Elliott's App. Pro., sec. 715; Ex parte Kearny, 55 Cal. 212; Wells' Jur., sec. 30; Mallett *v.* Uncle Sam, etc., Min. Co., 1 Nev. 188; 90 Am. Dec. 484; Schad *v.* Sharp, 95 Mo. 573; 8 S. W. Rep. 549; Coit *v.* Haven, 30 Conn. 190; 79 Am. Dec. 244; City of St. Louis *v.* Lanigan, 97 Mo. 175; 10 S. W. Rep. 475.

[2] *Ante*, secs. 7, 20, 22, 23.

[3] *Ante*, sec. 20.

[4] Galpin *v.* Page, 18 Wall. 350; Cooper *v.* Sunderland, 3 Ia. 114; 66 Am. Dec. 52. But see on this point *Ante*, sec. 20, and Sheldon *v.* Newton, 3 Ohio St. 494, 499.

[5] *Ante*, secs. 7, 20, 22, 23.

[6] *Ante*, secs. 7, 22, 23; Galpin *v.* Page, 18 Wall. 350.

[7] Elliott's App. Pro., sec. 715.

ject-matter is not in the court before whom the action is pending, or is exclusively in another court, or class of courts, to which it does not belong. So it is really a case in which it appears from the record that the court has not jurisdiction, and brings the case within the other rule that no presumption can prevail against the record. And this rule applies only to the general subject-matter, and not to the question of jurisdiction in a particular action. A want of jurisdiction in a particular case must be shown by the proper plea or answer.[1]

"It is a necessary presumption that the court of general jurisdiction can act upon the given case when nothing appears to the contrary; hence has arisen the rule that the party claiming an exemption from its process must set out the reasons by a special plea in abatement, and show that some inferior court of law or equity has the exclusive cognizance of the case, otherwise the superior court must proceed in virtue of its general jurisdiction."[2]

If a court of general jurisdiction must, in the given case, acquire or exercise jurisdiction, not according to the general course of proceeding in such court, but in a special mode provided by statute, in that particular case, or in the class of cases to which it belongs, the jurisdiction is special in its nature, and the court a court of inferior jurisdiction with respect to that case.

The rule has been laid down in general terms that "when a superior court exercises special statutory powers in accordance with the usual form of common law or chancery proceedings, the usual presumptions as to its jurisdiction are entertained, but when those powers are to be exercised in a special or summary manner, the record must show that the court had jurisdiction, and that it proceeded in the way provided by the statute."[3]

The distinction is often made to turn upon the question

[1] State of Rhode Island *v.* State of Massachusetts, 12 Pet. 657, 718; Elliott's App. Pro., sec. 715.

[2] State of Rhode Island *v.* State of Massachusetts, 12 Pet. 657, 718.

[3] 12 Am. & Eng. Enc. of Law, 276; Harvey *v.* Tyler, 2 Wal. 328; *ante*, sec. 22.

whether the court, in the given case, proceeds according to the course of the common law, or in accordance with some mode prescribed by statute.[1] But this distinction is calculated to mislead. In a certain sense none of the courts of many of the states in this country proceed according to the course of the common law. The mode of acquiring and exercising jurisdiction is almost always, and entirely, prescribed by statute, and the extent of the jurisdiction of every court is limited, to a certain extent, either by the constitution or statutes of the state, or of the United States.[2] Therefore, every such court acquires and exercises its jurisdiction according to statutory or constitutional provisions and not according to the course of the common law.

[1] *Ante*, secs. 7, 22, 23; Galpin *v.* Page, 18 Wal. 350; Freeman on Judg., sec. 127.

[2] *Ante*, secs. 7, 20, 22, 23; Harvey *v.* Tyler, 2 Wal. 328; Hahn *v.* Kelly, 34 Cal. 391, 409; 94 Am. Dec. 742.

In Harvey *v.* Tyler, *supra*, it is said: "The jurisdiction which is now exercised by the common law courts in this country, is, in a very large proportion, dependent upon special statutes conferring it. Many of these statutes create, for the first time, the rights which the court is called upon to enforce, and many of them prescribe with minuteness the mode in which those rights are to be pursued in the courts. Many of the powers thus granted to the court are not only at variance with the common law, but often in derogation of that law. In all cases where the new powers thus conferred, are to be brought into action in the usual form of common law or chancery proceedings, we apprehend there can be little doubt that the same presumptions as to the jurisdiction of the court and the conclusiveness of its action will be made, as in cases falling more strictly within the usual powers of the court. On the other hand, powers may be conferred on the court and duties required of it, to be exercised in a special and often summary manner, in which the order or judgment of the court can only be supported by a record which shows that it had jurisdiction of the case. The line between these two classes of cases may not be very well defined nor easily ascertained at all times. There is, however, one principle underlying all these various classes of cases, which may be relied on to carry us through them all when we can be sure of its application. It is, that whenever it appears that a court possessing judicial powers has rightfully obtained jurisdiction of a cause, all its subsequent proceedings are valid, however erroneous they may be, until they are reversed on error or set aside by some direct proceedings for that purpose. The only difficulty in applying the rule, is to ascertain the question of jurisdiction."

A statutory mode of acquiring jurisdiction, by a court of general jurisdiction, which is applicable to all cases cognizable in such court, and to all persons who may be brought before it, can not be regarded as a special mode of acquiring jurisdiction. This question has arisen most frequently where constructive service by publication, or in some other way, is provided for by statute. It has been held by the supreme court of the United States that no presumption will be entertained in favor of the jurisdiction of a court over the person of a non-resident defendant by constructive notice provided by statute.[1] And this doctrine is supported by other cases.[2]

But it is said in other cases that there should be no difference, with respect to the presumption in favor of the jurisdiction of a court of general jurisdiction, whether such jurisdiction must, under the statute, be acquired by publication or by personal service of summons.[3] And why should

[1] Galpin *v.* Page, 18 Wal. 350.

[2] Swift *v.* Meyers, 37 Fed. Rep. 37; Furgeson *v.* Jones, 17 Ore. 204; 20 Pac. Rep. 842; Moulin *v.* Insurance Co., 24 N. J. Law, 222.

[3] "There has been much difference of opinion in courts, for whose decisions we have the highest respect, as to whether the same presumptions will be indulged in favor of jurisdiction where reliance is placed on citation by publication and seizure of property as will be where personal service, made within the territory over which the court has jurisdiction, is relied upon. It seems to us that there can be no substantial reason for holding, in the one case, that it must be affirmatively shown that such process as the law declares sufficient was properly executed, while, in the other, this will be presumed if the record does not show to the contrary. Whether the jurisdiction of a court be general or special, can not be made to depend upon the character of the process through which it acquires power over the person or thing to be affected by its final adjudication. The constitution confers jurisdiction, but the legislature prescribes the process through which persons and things may be brought within its reach, and made subject to its exercise. It seems to us illogical to hold, when the averments of the pleadings show that personal service might have been made within the jurisdiction, that this will be presumed to have been done if the record be silent, or do not show to the contrary, when the court has exercised, or assumed to exercise, the power to make a final judgment, but to hold that the same presumption will not be indulged as to proper citation by publication, or as to the seizure of property, when the pleadings show that these things were necessary to be done, and could have been done, before the

there be? If such a mode of acquiring jurisdiction can properly be prescribed by statute, then it would seem to be reasonable that it should be presumed, as in all other cases, that the necessary steps to acquire such jurisdiction had been taken.[1] Whether, if such notice were actually proved by the record to have been given, it would vest the court with jurisdiction over the person of a non-resident is quite another question. It seems to be thoroughly settled that it would not.[2] But this has nothing to do with the question of presumption in favor of jurisdiction. Suppose this mode of acquiring jurisdiction over the person of its own citizens were provided by statute in any of the states in all cases. It would undoubtedly be a special mode of acquiring jurisdiction in the sense that it would not be according to the course of the common law. And yet, if such a mode of acquiring jurisdiction by courts of general jurisdiction were provided, no reason is apparent for holding that no presumption would be indulged in favor of the jurisdiction of the court under such conditions. But, as has been said, some of the cases, in holding that no presumption will be indulged in favor of the jurisdiction of a court where such jurisdiction must be obtained by publication, place it upon the ground that it is a special mode of acquiring jurisdiction and not according to the course of the common law.[3]

court assumed the power to render a final judgment. In either case, the presumption that the court did not render a final judgment until it was authorized to do so, arises from the fact that to have done otherwise would have been a breach of duty, which is never presumed from the doing of an act that may have been legal." Stuart *v.* Anderson, 70 Tex. 588; 8 S. W. Rep. 296. See, also, In re Newman, 75 Cal. 213; 16 Pac. Rep. 887; Sichler *v.* Look, 93 Cal. 600; 29 Pac. Rep. 220; Hahn *v.* Kelly, 34 Cal. 391, 408; 94 Am. Dec. 742; Cooper *v.* Sunderland, 3 Ia. 114; 66 Am. Dec. 52; City of St. Louis *v.* Lanigan, 97 Mo. 175; 10 S. W. Rep. 475.

[1] Applegate *v.* Lexington & Carter Co. M. Co., 117 U. S. 255; 6 Sup. Ct. Rep. 742, 747.

[2] *Ante*, sec. 15; Pennoyer *v.* Neff, 95 U. S. 714; Galpin *v.* Page, 18 Wall. 350; Belcher *v.* Chambers, 53 Cal. 635; In re Newman, 75 Cal. 213; 16 Pac. Rep. 887; Swift *v.* Meyers, 37 Fed. Rep. 37; Kane *v.* Cook, 8 Cal. 449.

[3] "The presumptions indulged in support of the judgment of superior

No doubt this distinction is maintained by the highest authority, but, if it extends so far as to hold that whenever a mode of acquiring jurisdiction, other than that known to the common law, is provided by statute, the presumption in favor of the jurisdiction of the court shall cease, for that reason, the distinction should be abolished. There is no reason why a state may not substitute a mode of notifying parties of the pendency of actions different from that recognized by the common law, and, if it does, no good reason is apparent for making any distinction as to the presumption that shall be indulged in favor of the jurisdiction based solely upon the difference in the mode of acquiring such jurisdiction.

This doctrine, so broadly laid down by the Supreme Court of the United States, is very materially modified by other decisions of the same court.[1]

courts of general jurisdiction are also limited to jurisdiction over persons within their territorial limits, persons who can be reached by their process, *and also over proceedings which are in accordance with the course of the common law.* . . .

"But it is said that the court exercises the same functions and the same power whether the service be made upon the defendant personally, or by publication, and that therefore the same presumption of jurisdiction should attend the judgment of the court in the one case as in the other. *This reasoning would abolish the distinctions in the presumptions of law when applied to the proceedings of a court of general jurisdiction acting within the scope of its general powers, and when applied to its proceedings had under special statutory authority.* And, indeed, it is contended that there is no substantial ground for any distinction in such cases. The distinction, nevertheless, has long been made by courts of the highest character, both in this country and in England, and we had supposed that its exstence was not open to discussion." Galpin *v.* Page, 18 Wall. 350.

[1] Harvey *v.* Tyler, 2 Wall. 328; Hall *v.* Law, 102 U. S. 461; Vorhees *v.* Jackson, 10 Pet. 449; Applegate *v.* Lexington & Carter Co. Mining Co., 117 U. S. 255; 6 Sup. Ct. Rep. 742, 749.

In Applegate *v.* Lexington & Carter Co. Mining Co., *supra*, the court, after holding that where publication was ordered by the court it would be presumed that publication was made according to such order, stated the rule and distinguished the case of Galpin *v.* Page, as follows: "The result of the authorities and what we decide is that where a court of general jurisdiction is authorized in a proceeding, either statutory or at law or in equity, to bring in, by publication or other substituted serv-

And even as thus modified the doctrine has not been generally received as the correct rule on the subject, as appears from the authorities above cited.

The presumption of the jurisdiction of a domestic court includes the presumption, where the record is silent on the subject, that a defendant has been duly served with process, where the matter comes collaterally in question.[1] And the rule is applicable although the defendant is an infant.[2] But not on appeal.[3]

The United States courts, although courts of limited, are not courts of inferior or special jurisdiction, and their power to act will be presumed in case of a collateral attack.[4] But such courts possess no powers, except such as the constitution and acts of congress concur in conferring upon them, and in case of a direct attack their jurisdiction must affirmatively appear.[5]

ice, non-resident defendants interested in or having a lien upon property lying within its territorial jurisdiction, but is not required to place the proof of service upon the record, and the court orders such substituted service, it will be presumed, in favor of the jurisdiction, that service was made as ordered, although no evidence thereof appears of record, and the judgment of the court, so far as it affects such property, will be valid. The case of Galpin *v.* Page, 18 Wall. 350, cited by counsel for defendant, is not in conflict with this proposition. The judgment set up on one side and the tax on the other in that case was rendered on service by publication. The law permitted service to be made by publication only where certain facts were made to appear to the satisfaction of the court, and the court by a precedent order which must necessarily appear of record, authorized service to be made by publication. But the record showed no such order, and the publication, therefore, was the unauthorized act of the party, and appeared affirmatively to be invalid and ineffectual."

[1] Dwiggins *v.* Cook, 71 Ind. 579; Crane *v.* Kimmer, 77 Ind. 215, 219; Anderson *v.* Gray, 134 Ill. 550; 25 N. E. Rep. 843; State *v.* Ennis, 74 Ind. 17; Mahoney *v.* Middleton, 41 Cal. 41, 50.

[2] Crane *v.* Kimmer, 77 Ind. 215, 219.

[3] Carver *v.* Carver, 64 Ind. 194.

[4] *Ante*, secs. 7, 20, 22, 23; McCormick *v.* Sullivant, 10 Wheat. 192; Pierro *v.* St. Paul & N. P. R. Co., 37 Minn. 314; 34 N. W. Rep. 38; Ex parte Cuddy, 131 U. S. 280; 9 Sup. Ct. Rep. 703.

[5] *Ante*, secs. 7, 22; United States *v.* Southern Pac. R. Co., 49 Fed. Rep. 297, 300.

It is broadly stated, in this case, that the legal presumption is that

A very clear distinction has been made between domestic and foreign judgments as to the binding effect of the presumptions in favor of jurisdiction, the weight of authority being to the effect that in case of a collateral attack upon a domestic judgment the presumption is conclusive, while in case of a foreign judgment the presumption is not conclusive, but may be disproved by evidence *dehors* the record.[1] The presumption in case of a domestic judgment is that all of the facts necessary to give the court jurisdiction of the subject-matter and of the person existed.[2]

Presumptions in favor of jurisdiction can be indulged only when the record is silent.[3] If the record shows a want of jurisdiction no presumption will aid the defect.[4] And where the record shows that jurisdiction was attempted to be acquired in a certain way, or that a certain thing was done to obtain jurisdiction, there can be no presumption that jurisdiction was obtained in a different way or that something else was done.[5]

Where it is recited in the record that a defendant was duly served with process, but the sheriff's return shows that a part only of what was necessary to constitute due service was done, but does not show whether other required

every cause is without the jurisdiction of the circuit court of the United States unless the contrary affirmatively appears. But in view of the earlier cases on the subject the learned justice must be understood as speaking with reference to a direct attack, which was the question before the court.

[1] *Ante*, secs. 22, 23; Crim *v.* Kessing, 89 Cal. 478, 483; 26 Pac. Rep. 1074; Rape *v.* Heaton, 9 Wis. 327; 76 Am. Dec. 269; Crane *v.* Kimmer, 77 Ind. 215, 219.

[2] Ex parte Cuddy, 131 U. S. 280; 9 Sup. Ct. Rep. 703; Nichols *v.* State, 127 Ind. 406; 26 N. E. Rep. 839, 841; City of St. Louis *v.* Lanigan, 97 Mo. 175, 10 S. W. Rep. 475.

[3] Freeman on Judg., secs. 125, 132; Ex parte Ah Men, 77 Cal. 198; 19 Pac. Rep. 380; Hahn *v.* Kelly, 34 Cal. 391, 405; 94 Am. Dec. 742; Crane *v.* Kimmer, 77 Ind. 215; Settlemier *v.* Sullivan, 97 U. S. 444.

[4] Hahn *v.* Kelly, 34 Cal. 391, 402, 405; 94 Am. Dec. 742.

[5] Freeman on Judg., sec. 125; Hahn *v.* Kelly, 34 Cal. 391, 405; 94 Am. Dec. 742; Settlemier *v.* Sullivan, 97 U. S. 444, 447; Barber *v.* Morris, 37 Minn. 194; 33 N. W. Rep. 559.

acts were or were not done, it has been held that the recital in the record, although not contradictory of the officer's return, can not be held to add thereto, but must be held to be a statement that the acts shown by the return to have been done constituted due service, and that the return must control the recital.[1]

There is a clear distinction between a want of service and a defective service. If there has been an attempted service, and the question is one of fact as to whether the proper service was made, or one of law, whether the acts done constituted sufficient service or not, the presumption will be indulged that the court considered and determined the question, and the defect can only be taken advantage of by a direct attack.[2] This rule has been held to apply as well to constructive as to actual notice.[3] And the recitals in the record of a court of general jurisdiction showing that jurisdiction has been obtained by constructive service, are sufficient to uphold the judgment as against a collateral attack, where the same is not disputed by the record itself.[4]

The cases cited go a long way to uphold a judgment by the recitals in the record. It is held that such recitals are conclusive in case of a collateral attack, even as against the affidavit for an order of publication and the order itself, on the ground that such affidavit and order are not parts of the judgment roll, and can not be looked to to dispute the recitals in the judgment. In California, certain papers and documents constitute the judgment roll. The judgment roll constitutes the record in the absence of a bill of exceptions, or statement on appeal, which can only become part of the record in case of a direct attack. Consequently, as the affidavit and order for publication constitute no part of the judgment roll, or record, to al-

[1] Settlemier *v.* Sullivan, 97 U. S. 444.

[2] *Ante*, secs. 22, 23; Freeman on Judg., sec. 126.

[3] In re Newman, 75 Cal. 213; 16 Pac. Rep. 887; Sichler *v.* Look, 93 Cal. 600; 29 Pac. Rep. 220.

[4] McCauley *v.* Fulton, 44 Cal. 355, 361; In re Newman, 75 Cal. 213; 16 Pac. Rep. 887; Sichler *v.* Look, 93 Cal. 600; 29 Pac. Rep. 220.

low the recitals in the record to be disputed by such affidavit or order would be to allow a judgment, valid on its face, to be attacked by matters *dehors* the record, which is not allowed in case of a domestic judgment.[1]

Where the affidavit or other proceeding necessary to give jurisdiction is a part of the judgment roll, or of the record, and it appears therefrom that the necessary steps were not taken, a recital in the record showing jurisdiction will not prevail against the record itself.[2]

Where the attack upon the judgment is direct, it has been held that a recital of service in the record will not supply the place of the necessary affidavit, order, and proof of publication.[3]

The means by which a judgment may be assailed and overthrown, by showing want of jurisdiction, depend upon whether the attack is direct or collateral. In case of an attack upon a domestic judgment of a court of general jurisdiction, if the attack is collateral, the mere entry of a judgment is conclusive that the court had jurisdiction to enter it, unless the record shows to the contrary. If the attack is direct, the defendant may, by bill of exceptions, present evidence outside of the record to show a want of jurisdiction. But in either case the record is conclusive unless directly disproved, and such proof properly incorporated in the record and made a part of it by bill of exceptions, or some other authorized mode.[4]

[1] *Ante*, secs. 22, 23.

[2] Barber *v.* Morris, 37 Minn. 194; 33 N. W. Rep. 559.

[3] Weeks *v.* Gold Mining Co., 73 Cal. 599; 15 Pac. Rep. 302.

[4] Sichler *v.* Look, 93 Cal. 600, 605; 29 Pac. Rep. 220; Lyons *v.* Roach, 84 Cal. 27; 23 Pac. Rep. 1026.

"The presumption of verity which attaches to the record of a domestic judgment is the same upon a direct appeal therefrom as exists in a collateral attack, the only difference being that upon a direct appeal it is essential for the party seeking to sustain the judgment to show by the record itself that the court had jurisdiction of the defendant, whereas in a collateral attack the entry of the judgment is itself conclusive of such jurisdiction. Upon a direct attack, there is no presumption in favor of the existence of any fact essential to the jurisdiction of the court over the defendant; but in all matters of which the judgment contains a record, its verity, in the absence of any contradictory evi-

The general rule is that where a court has once acquired jurisdiction, it has a right to decide every question which

dence, will be presumed as fully as upon a collateral attack. The defendant may, upon a direct appeal, by bill of exceptions, present evidence outside of the record for the purpose of showing that the court did not have jurisdiction over him, while in a collateral attack such objection is available only when it appears from t ehrecord itself. In both cases the record is conclusive as to all matters as to which it speaks, unless impeached in the foregoing manner. As was said by Mr. Justice McFarland in Lyons *v.* Roach, 84 Cal. 30: 'The main difference between collateral and direct attack is, that in the former the record alone can be inspected, and is conclusively presumed to be correct; while on direct attack the true facts may be shown, and thus the judgment itself on appeal may be reversed or modified.' The recitals in a judgment are the court's record of its own acts. and although upon a direct appeal the jurisdiction of the court is not to be established by its mere assertion in the judgment that it had acquired jurisdiction, yet if such recital finds support in other portions of the record, which under any condition of facts could exist, it will be presumed, in the absence of any contradictory showing, that such condition of facts existed.

"The record of the judgment is the judgment roll. The documents which shall constitute this record are specified in section 670 of the Code of Civil Procedure to be: 'In case the complaint be not answered by any defendant, the summons, with the affidavit or proof of service, and the complaint, with a memorandum indorsed thereon, that the default of the defendant in not answering was entered, and a copy of the judgment;' and section 415 of the Code of Civil Procedure provides that 'proof of the service of summons and complaint must be: . . 3. In case of publication, the affidavit of the printer, or his foreman or principal clerk, showing the same, and an affidavit of a deposit of a copy of the summons in the post-office, if the same has been deposited.'

"Under these provisions, we must hold that the record of the judgment in the present case affirmatively shows that the court had jurisdiction of the appellant. It is recited therein that he had been 'duly and regularly summoned,' and there is found in the judgment roll, in support of this recital in the judgment, an affidavit of publication o the summons, and of a deposit of a copy thereof, as required by the statute. The statute has provided that, under certain circumstances, the court may obtain jurisdiction of a defendant by a service of the summons by publication, and what shall be the proof of such service; and in support of the judgment of the court, it will be presumed upon a direct appeal, in the absence of any evidence to the contrary, that this mode of service was made under a proper order of the court therefor, and that a sufficient affidavit for such order was presented to the court before making the order.

"The order of publication bearing date September 23, 1890, can not be considered for the purpose of impeaching the record of the judg-

arises in the cause, and it will be presumed that its jurisdiction was properly exercised throughout.[1] But this is so only where the court has, after obtaining jurisdiction, proceeded according to the established modes governing the class to which the case belongs, and has not transcended, in the extent or character of its judgment, the law applicable to such cases.[2] It is said that there can be no presumption in favor of jurisdiction of the person in case of default without appearance or service.[3] This is undoubtedly true where the attack is on appeal. In such case it is held that the record must show affirmatively that the defendant was served, or the cause will be reversed.[4] But it will be seen that in some, at least, of the cases cited, it was held that the entry of judgment by default, without a showing in the record of service, was erroneous because the statute required that in case of a judgment by default the summons and return, or notice and proof of publication thereof, must be a part of the record.[5] In none of the cases is the judgment held to be void for want of jurisdiction. They hold that such a judgment is erroneous. There is no distinction between a judgment by

ment, and can not be used in contradiction of such record, any more than any other order or minute of the court made in the action. Upon an appeal from a final judgment, the only papers that can be considered, where there is no bill of exceptions, are the notice of appeal and judgment roll. (Spinetti *v.* Brignardello, 53 Cal. 283.) If the appellant had desired to show that no order for publication was made until September 23d, and that the publication and mailing of the summons were premature and unauthorized, he should have presented such facts in a bill of exceptions by which the proofs upon which he would rely would be properly authenticated." Sichler *v.* Look, 93 Cal. 600, 605; 29 Pac. Rep. 220.

[1] Wells' Jur., sec. 38.

[2] Windsor *v.* McVeigh, 93 U. S. 274; *ante*, sec. 22.

[3] Elliott's App. Pro., sec. 716.

[4] Rany *v.* The Governor, 4 Blkf. (Ind.), 2; Cochnower *v.* Cochnower, 27 Ind. 253; Houk *v.* Barthold, 73 Ind. 21, 28; New Albany, etc., R. R. Co. *v.* Welsh, 9 Ind. 479; Townsend *v.* Townsend, 21 Ill. 540; Cole *v.* Allen, 51 Ind. 122; Wilkinson *v.* Bayley, 71 Wis. 131; 36 N. W. Rep. 836; Sichler *v.* Look, 93 Cal. 600; 29 Pac. Rep. 220.

[5] Cochnower *v.* Cochnower, 27 Ind. 254; New Albany, etc., R. R. Co. *v.* Welsh, 9 Ind. 479.

default and any other judgment in respect of the presumption of jurisdiction where the attack upon it is collateral.[1] It will be presumed that the judgment was supported by and within the issues raised by the pleadings, and that it is supported by whatever is essential to its validity.[2] Where the action is one affecting real estate, and the complaint does not show where the land is situated, it will be presumed to have been within the jurisdiction of the court.[3] Where the jurisdiction of an inferior court has attached, the same presumption prevails in favor of its subsequent proceedings that does in favor of those of a superior court.[4]

26. Effect of want of jurisdiction.—The general rule is that a judgment rendered by a court without jurisdiction of the subject-matter, or of the person of the defendant, is absolutely void.[5] But this is not true in all cases A judgment may show on its face that the court had jurisdiction when in fact it had not. In such case, with respect to domestic judgments of courts of general jurisdiction, the general rule is that the showing of jurisdiction, on the face of the record, is conclusive as against a collateral attack.[6] Therefore, the judgment is not void, but voidable only. So the judgment of a domestic court of general jurisdiction may be valid, although the court was without jurisdiction to render it, because the judg-

[1] Hahn *v.* Kelly, 34 Cal. 391, 402; 94 Am. Dec. 742; Sichler *v.* Look, 93 Cal. 600; 29 Pac. Rep. 220; Crane *v.* Kimmer, 77 Ind. 215, 218; Iles *v.* Watson, 76 Ind. 359, 361; Anderson *v.* Gray, 134 Ill. 550; 25 N. E. Rep. 843.

[2] Elliott's App. Pro., secs. 718, 719.

[3] *Ante*, secs. 11, 15; Brown *v.* Anderson, 90 Ind. 93; Warmoth *v.* Dryden, 125 Ind. 355; 25 N. E. Rep. 433.

[4] Cooper *v.* Sunderland, 3 Ia. 114; 66 Am. Dec. 52; Pursley *v.* Hayes, 22 Ia. 11; 92 Am. Dec. 350, 374, note.

[5] Webb *v.* Carr, 78 Ind. 455; Lovejoy *v.* Albee, 33 Me. 414; 54 Am. Dec. 630; Rodgers *v.* Evans, 8 Ga. 143; 52 Am. Dec. 390, 392, note; 1 Black on Judg., sec. 218; Freeman on Judg., sec. 120; 12 Am. & Eng. Enc. of Law, 311; Swiggart *v.* Harber, 4 Scam. 364; 39 Am. Dec. 418; Hahn *v.* Kelly, 34 Cal. 391; 94 Am. Dec. 742.

[6] *Ante*, secs. 23, 25; 1 Black on Judg., sec. 218; Hahn *v.* Kelly, 34 Cal. 391; 94 Am. Dec. 742.

ment appears on its face to be valid.[1] Not only so, but as against a collateral attack, the weight of authority is to the effect that the jurisdiction of such a court will, where the record is silent on the subject, be conclusively presumed.[2] Therefore, a judgment rendered without jurisdiction may be valid because of the presumption that obtains in its favor. These presumptions can not prevail, however, where the powers of the court are special.[3] Or where the court must, having jurisdiction of the subject-matter, proceed in a certain way provided by statute, and the record shows that the mode prescribed has not been followed.[3] Or where the law is such that the court could not, under any circumstances, have jurisdiction.[4]

And it must be borne in mind that, while the weight of authority seems to be against the right to attack a domestic judgment of a court of general jurisdiction collaterally, where the judgment appears upon its face to be valid, or where the record is silent on the subject, there are numerous cases holding that neither the presumption in favor of jurisdiction nor the recitals in the record are conclusive; that the judgment is always open to attack collaterally, and that a want of jurisdiction may be shown by parol or otherwise.[5]

The presumption of jurisdiction, or recitals in the record, are not conclusive in case of a foreign judgment.[6]

A void judgment is no judgment. It confers no rights and is no protection to an officer acting under process founded upon it.[7] It is unavailing for any purpose.[8] A

[1] *Ante*, secs, 23, 25.

[2] *Ante*, sec. 25; Coit *v.* Haven, 30 Conn. 190; 79 Am. Dec. 244, 249, note; 1 Black on Judg., sec. 218.

[3] *Ante*, secs. 20, 23, 25; Dynes *v.* Hoover, 20 How. 65.

[4] Webb. *v.* Carr; 78 Ind. 455; Gilliland *v.* Adm'r of Sellers, 2 Ohio St. 223; Freeman on Judg., sec. 120; Withers *v.* Patterson. 27 Tex. 491; 86 Am. Dec. 643, 647.

[5] *Ante*, secs. 23, 25; Horner *v.* State Bank of Indiana, 4 Ind. 130; 48 Am. Dec. 355, 359, note.

[6] *Ante*, secs. 23, 25; 2 Black on Judg., secs. 818, 835; Thorn *v.* Salmonson, 37 Kan. 441; 15 Pac. Rep. 588.

[7] Wise *v.* Withers, 3 Cranch, 331; Dynes *v.* Hoover, 20 How. 65; Bigelow *v.* Stearns, 19 Johns. (N. Y.) 39; 10 Am. Dec. 189.

[8] Frankel *v.* Satterfield, 19 Atl. 898.

judgment that is void on its face may be collaterally attacked at any time and however the question of its validity may arise.[1] A court of equity will not set it aside because it is a nullity.[2] It is otherwise where the invalidity of the judgment is not apparent on its face.[3]

27. Inherent powers of courts.—All courts of general and superior jurisdiction are possessed of certain inherent powers not conferred upon them by express provisions of law, but which are necessary to their existence and the proper discharge of the duties imposed upon them by law.[4] Of these inherent powers, the following may be enumerated: To punish for contempt;[5] to pass upon the constitutionality of statutes;[6] to make, modify, enforce, and suspend rules for the regulation of business before the court;[7] to grant new trials;[8] to open up, vacate, and re-

[1] *Ante*, sec. 23; Horton *v.* Howard, 79 Mich. 642; 44 N. W. Rep. 1112; Frankel *v.* Satterfield, 19 Atl. Rep. 898; Whitwell *v.* Barber, 7 Cal. 54.

[2] *Ante*, sec. 23. [3] Corwith *v.* Griffiny, 21 Barb. 9.

[4] Ex parte Adams, 25 Miss. 883; 59 Am. Dec. 234; 3 Am. & Eng. Enc. of Law, 799, and cases cited; Smythe *v.* Boswell, 117 Ind. 365; 20 N. E. Rep. 263; Sanders *v.* The State, 85 Ind. 318, 328; 44 Am. Rep. 29; Elliott's App. Pro., secs. 6, 7; Rottman *v.* Bartling, 37 N. W. Rep. 668.

[5] Ex parte Smith, 28 Ind. 47; Ex parte Adams, 25 Miss. 883; 59 Am. Dec. 234, 243, note; Neel *v.* State, 9 Ark. 259; 50 Am. Dec. 209; Little *v.* The State, 90 Ind. 338; 46 Am. Rep. 224.

"That courts possess inherent powers not derived from any statute is undeniably true. Among these powers are the right to correct their records so as to make them speak the truth, to pass upon the constitutionality of statutes, to prevent the abuse of their authority or process, and to enforce obedience to their mandates. If it were granted that courts possess only such rights and powers as are conferred by statute, they would be mere creatures of the legislature, and not independent departments of the government. They are not mere creatures of the legislature, but are co-ordinate branches of the government, and in their sphere not subject to legislative control. Deutschman *v.* Town of Charlestown, 40 Ind. 449; Cooley's Const. Lim. 114, 116; 2 Story's Const. 377." Sanders *v.* The State, 85 Ind. 318, 328; 44 Am. Rep. 29.

[6] Sanders *v.* The State, 85 Ind. 318, 328; 44 Am. Rep. 29; Elliott's App Pro., sec. 6.

[7] 12 Am. & Eng. Enc. of Law, 450; Elliott's App. Pro., sec. 7; Symons *v.* Bunnell, 20 Pac. Rep. 859; Shane *v.* McNeill, 76 Ia. 459; 41 N. W. Rep. 166.

[8] 16 Am. & Eng. Enc. of Law, 616; Commonwealth *v.* McElhaney, 111 Mass. 439, 441.

lieve parties from judgments;[1] to issue writs of mandate and injunction in aid of their jurisdiction;[2] to recall and otherwise control their process;[3] to control and direct their officers, including attorneys;[4] to amend their records and proceedings;[5] to appoint and remove necessary employees and assistants of the court;[6] to grant alimony;[7] to prevent the enforcement of a judgment obtained by duress or fraud;[8] and to suspend or disbar attorneys, or strike their names from the roll.[9] These and others of like nature are sometimes treated of as incidental powers for the reason, it is presumed, that they are not an exercise of the jurisdiction of the court in the ordinary and direct way, but for the purpose, usually, of making its ordinary exercise of jurisdiction effectual, and regulating the mode and manner of exercising such jurisdiction.[10] And jurisdiction is sometimes divided into *formal* and *summary*, the latter including the powers we are now considering.[11]

[1] State *v.* Sowders, 42 Kan. 312; 22 Pac. Rep. 425; Nealis *v.* Dicks, 72 Ind. 374; Kemp *v.* Cook, 18 Md. 130; 79 Am. Dec. 681, 684; Ladd *v.* Stevenson, 112 N. Y. 325; 19 N. E. Rep. 842.

[2] Elliott's App. Pro., sec. 45.

[3] McLean County Bank *v.* Flagg, 31 Ill. 290; 83 Am. Dec. 224; Loomis *v.* Lane, 29 Pa. St. 242; 72 Am. Dec. 625; Watson *v.* Reissig, 24 Ill. 281; 76 Am. Dec. 746, 748, note.

[4] In re Monroe, 46 Fed. Rep. 52; *post*, sec. 31.

[5] Burnett *v.* State, 14 Tex. 455; 65 Am. Dec. 131; Territory *v.* Christenson, 31 N. W. Rep. 847; Ex parte Henderson, 84 Ala. 36; 4 South. Rep. 284; Crim *v.* Kessing, 89 Cal. 478.

[6] In re Janitor of Supreme Court, 35 Wis. 410.

[7] Galland *v.* Galland, 38 Cal. 265; Butler *v.* Butler, 4 Littell (Ky.), 202; Poole *v.* Wilber, 30 Pac. Rep. 548.

[8] Sanders *v.* The State, 85 Ind. 318; 44 Am. Rep. 29. [9] *Post*, sec. 31.

[10] Wells' Jur., sec. 140 et seq.; Brown *v.* Brown, 4 Ind. 627; 58 Am. Dec. 641; In re Hawley, 104 N. Y. 250; 10 N. E. Rep. 352, 357.

[11] "The history and constitution of the courts in which an action is commenced having been thus stated, it is time to proceed to the consideration of the steps taken in the action itself. Before doing so, however, it is right to state in what manner these formal steps are liable to be affected or controlled by the summary, or, as it is sometimes called, *equitable* jurisdiction of the courts, for the jurisdiction of the superior courts is of two descriptions, *summary* and *formal*. The latter consists in the sanction given by the authority of the court to those formal *de cursu* proceedings which constitute the ordinary and regular steps in a suit; thus it is by virtue of its formal jurisdiction that the court issues

And sometimes their powers not expressly conferred

a writ to compel the defendant to appear; that it allows the plaintiff to sign judgment against the defendant if he make default in pleading; and, finally, that it awards execution in favor of the successful party. This is all done by virtue of its formal *de cursu* jurisdiction.

"But the courts have another sort of jurisdiction, a jurisdiction exercised in any stage of the suit in which it becomes necessary, and enabling them, in a summary manner, and on equitable principles, to prevent hardships, irregularities, and abuses, which would otherwise take place in the course of proceedings. This is called their *summary jurisdiction*, and is exercised by making rules and orders; not that every rule emanates from the equitable juricdiction of the court; for some rules there are which constitute part of its formal *de cursu* proceedings; for instance, making a judge's order a rule of court. It is not, therefore, intended to state, that all rules or orders emanate from the summary and equitable jurisdiction of the court, but those only on granting or refusing which the court or judge hears argument and exercises a discretion.

"In treating of the summary jurisdiction of the courts we will inquire, first, in what cases it exists; secondly, how it is exercised.

"First, then, when does it exist? It exists, either at common law, or under the provisions of certain acts of parliament. So far as it exists at common law, it is calculated to effect one of four purposes.

"1. To prevent the regulations of the courts from being infringed.

"2. To prevent their authority from being abused.

"3. To prevent it from producing hardship.

"4. To enforce good conduct on the part of those who are peculiarly within their jurisdiction.

"First, then, the court interferes summarily to prevent breaches of its own regulations. Under this head do all those cases range themselves, in which it interferes to set aside proceedings for irregularity; thus, there are certain rules which regulate the time for signing judgment; and if judgment be signed before the time prescribed by them, the court will set it aside for irregularity. Now, this it does by virtue of its summary jurisdiction, which it exercises, in this case, for the purpose of preventing a breach of its own regulations. And so in every case where a rule or regulation of a court is infringed, it will, on application, set aside the proceeding which has infringed it. But it is most important to remember, that every application upon this score must be made *as speedily as possible;* for R. 135, H. T. 1853, provides, that, 'No application to set aside process or proceedings for irregularity shall be allowed, unless made within a reasonable time; nor if the party applying has taken a fresh step, after knowledge of the irregularity.'

"Secondly. The court exercises its summary jurisdiction to prevent its own process or authority from being abused. Thus, if a designing person were, by false representations, to induce a poor ignorant man to sign a cognovit, or execute a *warrant of attorney*, the court would relieve

by law are classed under the head of constructive authority.[1]

Such inherent powers of courts as are necessary to the

him. So, if a judgment be signed contrary to good faith, it will be set aside; and so, if a plaintiff vexatiously bring two actions for the same cause, the court will force him to elect between them. In these cases, and such as these, the courts interfere in order to prevent their rules and their authority, created as both are for the advancement of justice, from being perverted and abused, so as to produce injustice and oppression. And it is plain that the administration of the laws would be in danger of falling into disrepute, were it not for this salutary exercise of jurisdiction.

"Thirdly. The third class of cases in which the courts exercise their summary jurisdiction is, where it is necessary so to do, in order to prevent their own rules from producing hardship. Thus, where a defendant, through some accident, has not delivered his plea within the proper time, and judgment by default is signed against him, this, though illiberal, when done so hastily as to amount to what is called '*snapping a judgment*,' is nevertheless regular, because the rules of the court give the plaintiff a right to do it. However, as it would be an extremely hard thing if the defendant were to be shut out of a good defense by a slight mistake on the part of his attorney, the court to prevent this hardship, will interpose its summary jurisdiction, and will set aside the judgment upon proper terms. In a word, whenever the suitor can point out some great hardship likely to arise from a strict observance of the rules by which the practice of the court is governe,d there he may apply for relief, which, ordinarily, will be granted; unless, indeed, he be willfully late in making application, or, unless the grant of relief to him would impose hardship on the opposite party. But this relief is granted as *a favor*, not as *a right*, and the court will, in bestowing it, impose any terms it thinks proper. Thus, it almost invariably imposes the payment of any costs which the other party may have incurred, and frequently, as for instance, in the case of setting aside a regular judgment, insists upon an affidavit of merits; and this is very right, for how ridiculous would it be to relieve a defendant from a judgment when he has no meritorious defense to the action, but is only anxious to postpone the payment of a fair debt, and set up vexatious, quibbling objections to a just demand.

"Under this head are also to be ranked application for further time to plead, and for leave to amend. But this beneficial power of the courts to amend has been greatly increased by different statutes.

"Fourthly. The courts exercise their summary jurisdiction for the purpose of preventing misconduct in their own officers, and persons immediately under the control of the courts. Thus, as attorneys are officers of the courts, supposed to be always in attendance there, and in-

[1] In re Hawley, 104 N. Y. 250; 10 N. E. Rep. 352, 357.

proper discharge of their duties, and the exercise of their jurisdiction, can not be taken away by the law-making power;[1] but they may be regulated by law, and confined to proper limits.[2]

The tendency of later legislation seems to be to limit and abridge the inherent powers and summary jurisdiction of courts. Especially is this the case in the matter of contempt proceedings. It is usually held that the law-making power may limit the powers of the court in this respect as to the extent of the punishment that may be inflicted and provide for and regulate the procedure in such cases,[3] but that the power to punish for contempt is absolutely necessary to the existence and usefulness of the courts, and can not be taken away altogether.[4]

vested as such with certain privileges and immunities, the courts think themselves bound to enforce the strictest observance of good faith and propriety on their part, and will always listen to complaints founded upon their conduct as attorneys. I say *as attorneys*, for the courts do not attempt to exercise control over their conduct in their own private affairs, which have nothing to do with their professional character. Ex parte Aitkin, 4 B. & Ald. 49." Smith's Ac. at Law, 20.

[1] In re Janitor Supreme Court, 35 Wis. 410.

[2] Smyth *v.* Boswell, 117 Ind. 365; 20 N. E. Rep. 263; Nealis *v.* Dicks, 72 Ind. 374; Maxwell *v.* Rives, 11 Nev. 213; Wyandotte Rolling Mills Co. *v.* Robinson, 34 Mich. 427.

[3] In re Pierce, 44 Wis. 411; Wyatt *v.* People, 28 Pac. Rep. 961.

[4] Hawkins *v.* State, 125 Ind. 570; 25 N. E. Rep. 818; Little *v.* The State, 90 Ind. 338; 46 Am. Rep. 224; Holman *v.* The State, 105 Ind. 513; 5 N. E. Rep. 556; Wyatt *v.* People, 28 Pac. Rep. 961.

"The power of the courts necessarily comes from the constitution; for, while it is true that the legislature does possess powers in their nature judicial, it does not possess purely judicial powers—that is such powers as courts of justice exercise. As the legislature possesses no purely judicial power, it can delegate none, although it may, in accordance with the constitution, create and designate judicial tribunals in which the power shall reside. When a court is created by the legislature under the constitution, all the powers essential to the existence of the tribunal, and the due exercise of its powers, at once vest in it from the constitution. Among the powers which vest in a constitutional court, such as our circuit courts, is that of maintaining its existence and dignity by punishing those who assume to treat it with contempt. This power, as has often been held, is an inherent one, and exists independently of statute. Little *v.* State, 90 Ind. 338; Holman *v.* State, 105 Ind. 513, 5 N. E. Rep. 556; Anderson *v.* Dunn, 6 Wheat. 204; Ex parte Rob-

It is said that the power to punish for contempt is exercised for two purposes: 1. To vindicate the dignity of the court, for disrespect shown to it or its orders. 2. To compel the performance of some order or decree of the court, which it is in the power of the party to perform, and which he refuses to obey.[1]

The power extends to the preservation of order and decorum in the presence of the court, which are essential to the proper discharge of its duties and the maintenance of its dignity, and the public respect,[2] and to securing obedience to its process and rules, protecting its officers and jurors from wrong, and rebuking interference with the conduct of business.[3]

The general rule is that the power to punish for contempt is a discretionary one, and that an appellate court will not interfere except where an abuse of discretion appears.[4] Some of the cases go still further, and hold that the action of a court in punishing for contempt is not

inson, 19 Wall. 505; Ex parte Terry, 128 U. S. 289; 9 Sup. Ct. Rep. 77. The legislature can not take from a constitutional court the power to punish for contempt, since that would make the judiciary subservient to the legislative department, and violate the provision which secures the independence of the different departments of government. The legislature may, within limits, regulate the procedure, but it can not by any regulation abridge or fetter the inherent power itself. The counsel for the appellants are, therefore, in error in assuming, as they do, that we must look solely to the statute to ascertain whether an act does or does not constitute a contempt. But if it should be conceded that the legislature may define a contempt, the concession would avail the appellants nothing, for the legislature has assumed to declare that resistance to an officer shall constitute a contempt. We do not, however, plant our conclusion upon the statute. We put the authority to punish a person who wrongfully resists the process of one of our circuit courts upon the high ground that it is an inherent power originating in the constitution, and by that instrument transmitted to the courts." Hawkins *v.* The State, 125 Ind. 570; 25 N. E. Rep. 818, 819.

[1] 3 Am. & Eng. Enc. of Law, 799; Texas *v.* White, 22 Wall. 157; Stimpson *v.* Putnam, 41 Vt. 238.

[2] Brown *v.* Brown, 4 Ind. 627; 58 Am. Dec. 641; In re Cheeseman, 49 N. J. Law, 115; 6 Atl. Rep. 513.

[3] Little *v.* State, 90 Ind. 338; 46 Am. Rep. 224.

[4] Brown *v.* Brown, 4 Ind. 627; 58 Am. Dec. 641.

subject to the review of any other court.[1] But the weight of authority is to the effect that a proceeding for contempt is in the nature of a criminal proceeding, and that a judgment or order punishing for contempt is subject to review on appeal or by *habeas corpus*.[2]

In *habeas corpus* proceedings the right of review is in some of the cases confined to an inquiry into the jurisdiction of the court.[3] In others, in which the right of review is maintained, the jurisdiction of the superior court is limited to the right to determine, in addition to the question of jurisdiction, whether the act charged, conceding it to have been committed, was such an act as constituted a contempt, it being held that the finding of the lower court that the act was committed was conclusive, and not subject to review.[4]

[1] State *v.* Tipton, 1 Blkf. (Ind.) 166; Kernodle *v.* Cason, 25 Ind. 362; Williamson's Case, 26 Pa. St. 9; 67 Am. Dec. 374; Cossart *v.* The State, 14 Ark. 539; State *v.* Galloway, 5 Coldwell (Tenn.), 326; 98 Am. Dec. 404, 414, note.

[2] Whittem *v.* The State, 36 Ind. 196, and cases cited; Ex parte Rowe, 7 Cal. 176; Ex parte Langdon, 25 Vt. 680; People *v.* Hackley, 24 N. Y. 74; In re Pierce, 44 Wis. 411.

[3] Commonwealth *v.* Lecky, 1 Watts. Pa. 66; 26 Am. Dec. 37, 49, note; Ex parte Adams, 25 Miss. 883; 59 Am. Dec. 234.

[4] "As a general rule, the propriety of a commitment for contempt is not examinable in any other court than the one by which it was awarded. This is especially true where the proceeding by which it is sought to be questioned is a writ of *habeas corpus;* as the question on the validity of the judgment then arises collaterally, and not by the way of review. The *habeas corpus* act, moreover, declares that where the detention of the party seeking to be discharged by *habeas corpus* appears to be for any contempt, plainly and specially charged in the commitment, ordered by a court of competent jurisdiction, he shall be remanded to the custody in which he was found. But this rule of course is subject to the qualification that the conduct charged as constituting the contempt must be such that some degree of delinquency or misbehavior can be predicated of it; for if the act be plainly indifferent or meritorious, or if it be only the assertion of the undoubted right of the party, it will not become a criminal contempt by being adjudged to be so. The question whether the alleged offender really committed the act charged, will be conclusively determined by the order or judgment of the court; and so with equivocal acts, which may be culpable or innocent according to the circumstances; but where the act is necessarily innocent or justifiable, it would be preposterous to hold it a cause of

There are two kinds of contempts, direct and constructive. A contempt is direct when committed in the presence of the court or so near to it as to interrupt its proceedings. Constructive contempts are such as are committed, not in in the presence of the court, but tend by their operation to interrupt, obstruct, embarrass, or prevent the due administration of justice.[1]

With respect to rules of court, they are necessary to the proper exercise of the functions of a court, and have become a very important branch of the law affecting the practice and proceedings of the courts. Especially does this seem to be so in England under the judiciary acts. The practice under those acts is very largely regulated by rules or orders of the supreme court of judicature.[2]

The right may be given and regulated by statute, but exists as an inherent power independent of positive law.[3]

There is no limit to the right of a court to make rules for its government, except that such rules must be reasonable and not in conflict with the constitution or statutes.[4]

A court can not make and enforce a rule that will deprive a party of a right given him by law or granting the right upon terms more onerous than those fixed by law.[5]

imprisonment. Hence, if the refusal of Mr. Hackley, the relator, to answer the question propounded to him, was only an assertion of a right secured to every person by the constitution, it was illegal to commit him for a contempt; and this error was certainly reached by the *certiorari*, if not examinable on the return to the *habeas corpus*." People *v.* Hackley, 24 N. Y. 74, 77.

[1] Whittem *v.* The State, 36 Ind. 196.

[2] Wilson's Jud. Acts, p. 18, sec. 23; p. 109, sec. 17.

[3] Shane *v.* McNeill, 76 Ia. 459; 41 N. W. Rep. 166.

[4] Gormerly *v.* McGlynn, 84 N. Y. 284, Redman *v.* The State, 28 Ind. 205; Wyandotte Rolling Mill Co. *v.* Robinson, 34 Mich. 428.

[5] Krutz *v.* Griffith, 68 Ind. 444; Krutz *v.* Howard, 70 Ind. 174; People *v.* McClellan, 31 Cal. 101; Rice *v.* Ehele, 55 N. Y. 518.

In Krutz *v.* Howard, 70 Ind. 174, 177, the court said: "The seventh clause of section 207 of the code enacts: 'When either party shall make and file an affidavit of the bias, prejudice, or interest of the judge before whom the said cause is pending, the said court shall grant a change of venue.'

"Under this statute, this court has frequently decided, that, if the affidavit fulfills the requirements of the statute, the duty to grant the

In many of the states the power to make rules is expressly given by statute, and where such power is limited by statute, such limitations must be observed.[1] A rule of court adopted under a statutory provision authorizing it becomes a law binding upon the court as well as upon litigants before it.[2] And it is held in some of the cases that so long

change of venue is imperative upon the court. Witter *v.* Taylor, 7 Ind. 110; Mershon *v.* The State, 44 Ind. 598; Fisk *v.* The Patriot and Barkworks Turnpike Co., 54 Ind. 479; Duggins *v.* The State, 66 Ind. 350; Krutz *v.* Griffith, 68 Ind. 444.

"That the affidavit complies with the statute in this case, as to the affiant, is not questioned. Was it necessary that it should comply with the rule of court? Courts have the power, and it is their duty, to adopt rules for conducting the business therein, not repugnant to the laws of the state. Is this rule of the court repugnant to the laws of the state? We think it is. By the law, the party need state only the bias, prejudice, or interest of the judge before whom the cause is pending, to entitle him to a change of venue. By the rule of court, in addition to one of these, the affiant, being a defendant, is required to state that he is informed and believes he has a good defense, and in general terms to state the character of the defense, and also that the application is not made for delay. We do not see what this rule has to do with conducting the business of the court. It does not relate to simplifying or expediting the proceedings, or presenting distinctly the points in issue, or diminishing costs, or in remedying any imperfections that exist in the practice; it simply adds and is repugnant to the law. The court can not add to or take from the law 'one jot or one tittle.' It must adjudicate and administer the law as it is. The court erred in overruling the motion for a change of venue."

[1] Gormerly *v.* McGlynn, 84 N. Y. 284; 2 Work's Ind. Prac. and Pl., sec. 1273.

[2] 4 Am. and Eng. Enc. of Law, 451; Thompson *v.* Hatch, 3 Pick. (Mass.) 512.

"But a rule of the court thus authorized and made, has the force of law, and is binding upon the court, as well as upon parties to an action, and can not be dispensed with to suit the circumstances of any particular case. In the case before us, the plea was allowed to be filed on the fifth day of the term, although the rule allows but four days for that purpose. The circumstances were such as would justify that order of the court, if it had had power to pass it; but we are satisfied that no one judge of the court of common pleas, or of this court, has authority to dispense with rules deliberately made and promulgated, on account of the hardship of any particular case, any more than he would have authority to dispense with any requisition of the legislature itself. The courts may rescind or repeal their rules, without doubt, or in establishing them, may reserve the exercise of discretion for particular cases. But the rule once made without any such qualification, must be applied

as a rule of court remains unrepealed it can not be dispensed with or suspended in a particular case.[1] But the general rule on the subject is that a court has the power, at all times, to suspend its own rules, or to except particular cases from their operation whenever the purposes of justice require it.[2] This is a power, however, that should be rarely exercised, and only for the purpose of avoiding injustice, as the permanency of rules of court, and their uniform enforcement and application are necessary to give uniformity to the practice and place all litigants upon an equal footing.[3] Whether a rule shall be suspended or not is a matter of discretion with the court, and can not be claimed as a right.[4] A court may, by rule, supply an omission in the law as to the practice affecting the manner of bringing cases before it.[5] But where a statutory mode of procedure is provided a court can not, by rule, prescribe a different mode.[6] Courts have full power to construe their own rules.[7] And in some cases it is held that an appeal will not lie from an order of a court that gives a construction to its rules. This is no doubt true where the question is one of discretion, and the rule affects merely the time when a thing shall be done, or the like, but it can not be true that a court may, in all cases, disregard, misconstrue, or violate its own rules, and that no appeal will lie from its action.[8] But unless it clearly appears, on appeal, that

to all cases which come within it, until it is repealed by the authority which made it." Thompson *v.* Hatch, 3 Pick. (Mass.) 512.

[1] Thompson *v.* Hatch, 3 Pick. 512.

[2] United States *v.* Breitling, 20 How. 252; Clark *v.* Brooks, 26 How. Prac. 285; Martine *v.* Lowenstein, 68 N. Y. 456; Manhattan Life Ins. Co. *v.* Francisco, 17 Wall. 672; Symons *v.* Bunnell, 20 Pac. Rep. 859; Sheldon *v.* Risedorph, 23 Minn. 518; Pickett *v.* Wallace, 54 Cal. 147.

[3] Walcott *v.* Schenck, 23 How. Prac. 385.

[4] Manhattan Life Ins. Co. *v.* Francisco, 17 Wall. 672.

[5] Pieper *v.* Centinella Land Co., 56 Cal. 173.

[6] Sommers *v.* Sommers, 81 Cal. 608; 22 Pac. Rep. 967; Wyandotte Rolling Mills Co. *v.* Robinson, 34 Mich. 427; Angel *v.* Plume & Atwood Man. Co., 73 Ill. 412.

[7] Martine *v.* Lowenstein, 68 N. Y. 456; Bair *v.* Hubartt, 139 Pa. St. 96; 21 Atl. Rep. 210.

[8] Thompson *v.* Hatch, 3 Pick. 512; ex parte Whitney, 13 Pet. 404, 407;

a rule of the court below has been violated, the construction put upon it by the latter court will not be reviewed.[1] A court may establish a rule for its government by a long and continuous acquiescence in a particular course of practice without having any written rule on the subject.[2] A court can not be compelled, by mandamus, to comply with the rules of the court, although such rules are prescribed by a higher court.[3]

While the right to grant new trials is inherent in every court of general jurisdiction, the law-making power may control the right and prescribe when and how applications therefor may be made, and the terms upon which new trials may be granted, and these limitations are binding on the courts.[4] But statutory provisions authorizing courts of general jurisdiction to grant new trials are regarded as limitations of, and not grants of jurisdiction.

It has been doubted, in some cases, whether inferior courts possess inherent power to grant new trials.[5] And in others it has been held that they have no such power unless expressly conferred upon them by statute.[6] These inherent powers are held in some cases not to belong to inferior courts.[7] And the question whether a court is one of superior or inferior jurisdiction is sometimes made to turn upon the other question whether it has inherent power to punish for contempt.[8] But usually the dividing line is

Bair *v.* Hubartt, 139 Pa. St. 96; 21 Atl. Rep. 210; Nevin *v.* Morrison. 18 Atl. Rep. 636.

[1] Nevin *v.* Morrison, 18 Atl. Rep. 636.

[2] Fullerton *v.* Bank of the United States, 1 Pet. 604, 612.

[3] Ex parte Whitney, 13 Pet. 404, 407.

[4] Fox *v.* Meacham, 6 Neb. 530; Commonwealth *v.* McElhaney, 111 Mass. 439.

[5] Commonwealth *v.* McElhaney, 111 Mass. 439.

[6] People *v.* Sessions of Chenango, 2 Caine's Cases (N. Y.), 318; Foist *v.* Coppin, 35 Ind. 471; Vogel *v.* Lawrenceburg Tobacco Man. Co., 49 Ind. 218; Brown *v.* Goble, 97 Ind. 86.

[7] In re Hawley, 104 N. Y. 250; 10 N. E. Rep. 352, 357; Doctor *v.* Hartman, 74 Ind. 221, 225; Foist *v.* Coppin, 35 Ind. 471; In re Mason, 43 Fed. Rep. 510, 515; Commonwealth *v.* McElhaney, 111 Mass. 439.

[8] *Ante*, secs. 6, 7.

drawn between courts of record and courts not of record.[1] Later decisions show a tendency to extend the right to exercise these powers to all courts, at least with respect to contempts.[2]

As to inferior courts, it is sometimes held that they have power to punish for a direct contempt, but not for a constructive one.[3] But the better rule is that all courts have the power to punish for contempt independent of statutory authority. There is no good reason for holding that a court which needs protection, by the exercise of the power, because of its inferiority and weakness, should be denied the authority.[3] The power is confined to courts, and can not be exercised by executive or ministerial officers.[4]

A court has unlimited power to amend its records to conform to the facts. But, as to matters of substance, the power to amend is generally held to cease with the term at which the record is made.[5]

In case of an appeal, it is held that the court below has power to amend its records at any time before final decree in the appellate court.[6]

28. Powers of illegal and de facto courts.—The acts of an illegal court, or one not authorized by law, are void.[7] But there is a marked distinction, in this respect, between a *court* and the *judge* of a court. If there be a legally constituted court, but the person claiming to be the judge thereof has not been legally elected or appointed as such

[1] *Ante*, sec. 7; In re Mason, 43 Fed. Rep. 510, 515.

[2] In re Monroe, 46 Fed. Rep. 52; Clark *v.* People, Breese (Ill.), 340; 12 Am. Dec. 177, 180, note; Rottman *v.* Bartling, 37 N. W. Rep. 668; Wyatt *v.* People, 28 Pac. Rep. 961.

[3] Clarke *v.* People, 12 Am. Dec. 181, note.

[4] Langensberg *v.* Decker, 31 N. E. Rep. 190.

[5] Territory *v.* Christenson, 31 N. W. Rep. 855, note; Sugg *v.* Thornton, 73 Tex. 666; 9 S. W. Rep. 145; Harris *v.* State, 24 Neb. 803; 40 N. W. Rep. 317.

[6] Ex parte Henderson, 84 Ala. 36; 4 South. Rep. 284.

[7] People *v.* Toal, 85 Cal. 333; 24 Pac. Rep. 603; Rose *v.* Himely, 4 Cranch, 241, 267.

judge, or is incompetent for any other reason to hold the court, his acts may be valid as a *de facto* judge the same as any other *de facto* officer.[1] But, if one is assuming to act as the judge of a court that has no existence, whether he has been duly or regularly elected or appointed to the position or not, is immaterial. His acts are absolutely void.[2] It is not sufficient that the individual holding the court is in fact acting as judge. It must appear that he is holding under color of office. It is held, therefore, that, where an attorney assumes to act as judge of the court under a statute attempting to authorize him to do so, his acts are not the acts of a court, and are wholly void.[3] But, in some of the states, attorneys are authorized, under certain conditions, to act as judges, temporarily, and their acts are held to be valid.[4]

It is said that, "where a court or office is established by a legislative act, apparently valid, and the court has gone

[1] People *v.* Sassovich, 29 Cal. 480, 485; People *v.* Burbank, 12 Cal. 378, 386; Wilcox *v.* Smith, 5 Wend. 231; 21 Am. Dec. 213, 217, note; Moses *v.* Julian, 45 N. H. 52; 84 Am. Dec. 114, 133, note; People *v.* Terry, 108 N. Y. 1; 14 N. E. Rep. 815; State *v.* Carroll, 38 Conn. 449; 9 Am. Rep. 409; Sheehan's Case, 122 Mass. 445; 23 Am. Rep. 374.

[2] People *v.* Toal, 85 Cal. 333; 24 Pac. Rep. 603; The Chicago & N. W. Ry. Co. *v.* Langlade Co., 56 Wis. 614, 627; 14 N. W. Rep. 844.

"But, conceding that the police court of Los Angeles was not legally established, it is further contended that the fact can not avail the appellant in this case; that, whether it was or not, the pretended judge thereof was a *de facto* judge, and his right to the office, or his power and jurisdiction, can not be questioned in this collateral way, but must be raised by a direct action for that purpose. We think this point would be well taken if this were an attempt to test the right of some one to hold an existing office. (Hull *v.* Superior Court, 63 Cal. 174–179; Buckner *v.* Veuve, 63 Cal. 304; Fraser *v.* Freelon, 53 Cal. 647.) But the question presented here is not as to the right of a particular person to hold an existing office. There can not be a *de facto* judge of a court that has no existence." People *v.* Toal, 85 Cal. 333, 338; 24 Pac. Rep. 603.

"An officer *de facto* is one who comes into *a legal and constitutional office* by color of a legal appointment or election to that office." People *v.* White, 24 Wend. (N. Y.) 520, 539.

[3] Van Slyke *v.* Trempealeau F. M. F. Ins. Co., 39 Wis. 390; 20 Am. Rep. 50.

[4] Rogers *v.* Beauchamp, 102 Ind. 33; 1 N. E. Rep. 185; Kenney *v.* Phillipy, 91 Ind. 511.

into operation or the office is filled and exercised under the act, it is a *de facto* court or office, and its legality can not be called in question collaterally, or except in a direct proceeding by the state for state purposes."[1] But it is believed that this doctrine, so far, at least, as it applies to courts, can not be sustained by reason or authority.[1]

29. CONSTITUTIONAL LIMITATIONS OF JURISDICTION.—Under the constitutions of the United States and of the several states, the government of each is divided into different departments, neither of which can encroach upon or exercise the powers and functions of the other.[2] The "legislature makes, the executive executes, and the judiciary construes the law."[3] And, where one of these departments of government assumes to perform the duties, or exercise the powers, of another department, or to control its action, its acts are void.[4] So, if one department of government attempts to, or does, interfere with or obstruct another in the performance of its duties, it may be prevented from so interfering. But this doctrine does not prevent the judicial department of government from enforcing the performance of merely ministerial duties by officers of other departments.[5] But the jurisdiction of the courts to enforce or control action on the part of officers of other departments does not extend to acts calling for the exercise of judgment or discretion, or to executive or political acts.[6] The principle that authorizes a court to enforce the per-

[1] Kelly *v.* Bemis, 64 Am. Dec. 54, note.

[2] People *v.* Nelson, 133 Ill. 565; 27 N. E. Rep. 217, 226; Cooley's Const. Lim., * pp. 87–93; Anderson's Dic. of Law, 342; State *v.* Hyde, 121 Ind. 20; 22 N. E. Rep. 644.

[3] Wayman *v.* Southard, 10 Wheat. 1, 46.

[4] Baggs' Appeal, 43 Pa. St. 512; 82 Am. Dec. 583; Miles *v.* Bradford, 22 Md. 170; 85 Am. Dec. 643.

[5] United States *v.* Guthrie, 17 How. 284; State *v.* Doyle, 40 Wis. 175, 188; 22 Am. Rep. 692; Decatur *v.* Paulding, 14 Pet. 497, 514.

[6] Ex parte Echols, 39 Ala. 698; 88 Am. Dec. 749; United States *v.* Guthrie, 17 How. 284; Brashaer *v.* Mason, 6 How. 92, 97; Miles *v.* Bradford, 22 Md. 170; 85 Am. Dec. 643; Decatur *v.* Paulding, 14 Pet. 497, 514; March *v.* The State, 44 Tex. 64; Marbury *v.* Madison, 1 Cranch, 137; Jones *v.* United States, 137 U. S. 202; 11 Sup. Ct. Rep. 80.

formance of a ministerial act gives like authority to prevent a violation of a ministerial duty.[1]

The extent to which the courts may go in controlling action on the part of officers of other departments of government seems to be very thoroughly determined. The authority only extends to ministerial acts not calling for the exercise of judgment or discretion. But the great difficulty has been to distinguish between acts purely ministerial and such as are judicial, political, executive, or discretionary in their nature. It is impossible to lay down any general rule that would distinguish these different powers with sufficient accuracy to be relied upon. This has been attempted by the courts in many instances, but the effort is usually accompanied by an acknowledgment that general rules or definitions are not to be relied upon.[2]

[1] Board of Liquidation *v.* McComb, 92 U. S. 531, 541.

[2] Decatur *v.* Paulding, 14 Pet. 497, 514, 518; Bledsoe *v.* Int. R. R. Co., 40 Tex. 537, 556.

"It is unnecessary to give an account of the origin and use of the writ of *mandamus* in England. It has been more or less employed in all the courts of America for many years, and the principles applicable to its use have been much discussed. It is sufficient to say that the proceeding by *mandamus* has for its object the enforcement of a duty, and that it has ever been regarded as an extraordinary remedy, subject to important restrictions. A *mandamus* will issue to an officer of the government only when the duty to be performed is ministerial in its character; and, when a duty is imposed upon the officer requiring the exercise of judgment or discretion, a *mandamus* will not lie. (5 Texas, 478; 12 Pet. R. 524, 609; 7 Cr. R. 504; 6 Wheat. 598; 6 How. 92.)

"It was said by Justice Wheeler: 'The distinction between ministerial and judicial and other official acts seems to be that, when the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment, the act is ministerial; but, when the act to be done involves the exercise of discretion or judgment in determining whether the duty exists, it is not to be deemed merely ministerial.' (5 Texas, 479.)

"This, perhaps, defines the rule as clearly as it can be done, yet it must be admitted that the use of terms handed down from a country where a different government and different laws obtain, is calculated to make it difficult of application to particular cases. The word 'ministerial' has reference generally to an act done under authority of a superior; and in this sense it could never apply to the chief executive with respect to any thing required by the legislative authority. The word 'discretion' strictly applies to but few acts. The governor has a discre-

Yet, while these general rules and definitions can not determine in all cases whether an act is ministerial, political, executive, or judicial, they aid us materially in arriving at a proper conclusion in any particular case.

"A ministerial act is one which a person performs in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, and without regard to, or the exercise of, his own judgment upon the propriety of the act to be done."[1]

"A ministerial duty, the performance of which may in proper cases be required of the head of a department of government, by judicial process, is one in respect to which nothing is left to discretion. It is a simple, definite duty, arising under conditions admitted or proved to exist and imposed by law."[2]

A judicial act is defined to be "an act performed by a

tion in the exercise of the pardoning power, and sometimes a court in determining the amount of a fine; but the instances are few indeed where an officer, executive or judicial, in exercising the functions of his office, is left to act solely at his discretion. 'The discretion of a judge is said to be the law of tyrants.' (Bouvier.) So, also, the word 'judgment' most generally has reference to some determination by a judicial tribunal. It is evident, then, that these words are not to be used in a restricted sense. Where the line of demarkation lies between a ministerial act and an act involving the exercise of judgment, is not always easy to determine. In the case of Decatur *v.* Paulding, 14 Peters, 518, Justice Catron said: 'Any sensible distinction applicable to all cases it is impossible to lay down; such are the refinements and mere verbal distinctions as to leave an almost unlimited discretion to the court. How easily the doctrine may be pushed and widened to any extent, the case furnishes an excellent illustration. The process of reasoning adopted by those who maintain the power to assume jurisdiction is that, where a right exists by law to demand money of an officer, and he refuses to pay, the court can enforce the right by *mandamus*, and, to ascertain the existence of the right, it is the duty of the court to construe the law; and if, by such construction, the right is found and the refusal to pay ascertained to have been a mistake, then the officer will be coerced to pay out the money as a ministerial duty.' This reasoning is then pronounced an assumption which can not be recognized." Bledsoe *v.* Int. R. R. Co., 40 Tex. 556.

[1] Anderson's Dic. of Law, 677; Flournoy *v.* Jeffersonville, 17 Ind. 169; 79 Am. Dec. 468.

[2] Id.

court touching the rights of parties, or property, brought before it by voluntary appearance or by the prior action of ministerial officers."[1]

Legislative power is the power to enact laws or to declare what the law shall be;[2] to enact, amend, or repeal laws.[3] Laws are *made* by the legislature and *applied* by the courts.[4]

It is the duty of the executive department of the government to enforce the laws. If the acts to be done in carrying the law into effect require the exercise of judgment or

[1] Flourney *v.* Jeffersonville, 17 Ind. 169, 172; 79 Am. Dec. 468; Pennington *v.* Streight, 54 Ind. 376, 377; Smith *v.* Strother, 68 Cal. 194; 8 Pac. Rep. 852.

[2] Anderson's Law Dic. 611; Sinking Fund Cases, 99 U. S. 761.

[3] Cooley Const. Lim. *pp. 90–92.

[4] Merrill *v.* Sherburne, 1 N. H. 204; 8 Am. Dec. 52; Smith *v.* Strother, 68 Cal. 194; 8 Pac. Rep. 852.

"This leads to the inquiry, what is legislative power? And upon that subject there is an abundance of authority. The word 'legislative' is defined by Worcester as follows: 'That which makes or enacts laws; law-making; legislative power; of or pertaining to legislation, or to a legislature—as, legislative proceedings.' 'Legislative' is defined by Zell as follows: 'Making, giving, or enacting laws; relating or pertaining to the passing of laws.' Webster defines 'legislative' as follows: 'Giving or enacting laws; as, a legislative body. Pertaining to the enactment of laws; suitable to laws; as, the legislative style. Done by enacting; as, a legislative act.' Wharton, in his lexicon, defines 'legislation' as follows; 'The act of giving or enacting laws; 'legislature,' the power to make laws.' Abbott, in his Law Dictionary, under the head 'legislate,' has the following: 'To make laws. 'Legislature,' the body of persons in the state clothed with the authority to make laws, 'Legislative power,' that one of the three great departments into which the powers of government are distributed, legislative, executive, and judicial, which is concerned with enacting or establishing, and, incidentally, with repealing, laws.' We find the following in Sinking Fund Cases, 99 U. S. 761, speaking of the judicial and legislative departments: 'The one determines what the law is and what the rights of parties are with reference to transactions already had; the other prescribes what the law shall be in future cases arising under it.' Legislative power is the power to enact, amend, or repeal laws. Railroad Co. *v.* Geiger, *supra;* Cooley's Const. Lim. 90; Hawkins *v.* Governor, 1 Ark. 570; Wayman *v.* Southard, 10 Wheat. 46; Greenough *v.* Greenough, 11 Pa. St. 494." City of Evansville *v.* State, 118 Ind. 426; 21 N. E. Rep. 267, 272.

discretion they are executive or political, and not ministerial, and can not be controlled by the courts.[1]

It makes no difference by whom an act is performed, whether by a ministerial, executive, or judicial officer, in determining whether it is ministerial or not. The distinction depends upon the nature of the act done or to be done, and not upon the character of the officer by whom it is to be performed.[2]

[1] Mississippi *v.* Johnson, 4 Wall. 475; The State *v.* Governor, 5 Ohio St. 528, 534; Jones *v.* United States, 137 U. S. 202; 11 Sup. Ct. Rep. 80.

"The single point which requires consideration is this: can the president be restrained by injunction from carrying into effect an act of congress alleged to be unconstitutional? It is assumed by the counsel for the State of Mississippi that the president, in the execution of the reconstruction acts, is required to perform a mere ministerial duty. In this assumption there is, we think, a confounding of the terms 'ministerial' and 'executive,' which are by no means equivalent in import. A ministerial duty, the performance of which may, in proper cases, be required of the head of a department, by judicial process, is one in respect to which nothing is left to discretion. It is a simple, definite duty, arising under conditions admitted or proved to exist, and imposed by law. . . . Very different is the duty of the president, in the exercise of the power, to see that the laws are faithfully executed, and, among these laws, the acts named in the bill. By the first of these acts, he is required to assign generals to command in the several military districts, and to detail sufficient military force to enable such officers to discharge their duties under the law. By the supplementary act, other duties are imposed on the several commanding generals, and these duties must necessarily be performed under the supervision of the president as commander-in-chief. The duty thus imposed on the president is in no just sense ministerial. It is purely executive and political." Mississippi *v.* Johnson, 4 Wall. 475.

[2] Kendall *v.* Stokes, 3 How. 87; Marbury *v.* Madison, 1 Cranch, 137, 164; The State *v.* Governor, 5 Ohio St. 528; Chamberlain *v.* Sibley, 4 Minn. 309.

"Can the chief executive officer of the state be directed or controlled in his official action by proceedings in *mandamus?* It is claimed, on the part of the defense, that, inasmuch as the government is by the constitution divided into the three separate and co-ordinate departments, the legislative, the executive, and the judicial, and inasmuch as each department has the right to judge of the constitution and laws for itself, and each officer is responsible for an abuse or usurpation in the mode pointed out in the constitution, it necessarily follows that each department must be supreme within the scope of its powers,

The judicial power of the government may so far regu-

and neither subject to the control of the other for the *manner* in which it performs, nor its *failure* to perform, either its legal or constitutional duties. This argument is founded on theory rather than reality. That each of these co-ordinate departments has duties to perform in which it is not subject to the controlling or directing authority of either of the others, must be conceded. But this independence arises not from the grade of the officer performing the duties, but the nature of the authority exercised. Under our system of government, no officer is placed above the restraining authority of the law, which is truly said to be universal in its behests—'all paying it homage, the least as feeling its care, and the greatest as not exempt from its power.' And it is only where the law has authorized it, that the restraining power of one of these co-ordinate departments can be brought to operate as a check upon one of the others. The judicial power can not interpose and direct in regard to *the performance* of an official act which rests in *the discretion* of any officer, whether executive, legislative, or judicial. In Marbury *v.* Madison, 1 Cranch, 170, Chief-Justice Marshall said: 'It is not by the office of the person to whom the writ is directed, *but the nature of the thing to be done*, that the propriety or impropriety of issuing a *mandamus* is to be determined.'

"The constitutional provision declaring that 'the supreme executive power of this state shall be vested in the governor,' clothes the governor with important political powers, in the exercise of which he uses his own judgment or discretion, and in regard to which his determinations are conclusive. But there is nothing in the nature of the chief executive office of this state which prevents the performance of some duties *merely ministerial* being enjoined on the governor. While the authority of the governor is *supreme* in the exercise of his political and executive functions which depend on the exercise of his own judgment or discretion, the authority of the judiciary of the state is *supreme* in the determination of all legal questions involved in any matter judicially brought before it. Although the state can not be sued, there is nothing in the nature of the office of governor which prevents the prosecution of a suit against the person engaged in discharge of its duties. This is fully sustained by the analogy of the doctrine of the Supreme Court of the United States, in the case of Marbury *v.* Madison, 1 Cranch, 170." State *v.* Governor, 5 Ohio St. 534.

"This court will not undertake to compel the governor of the state to the performance of any duty devolving upon him as the chief executive, and properly pertaining to such office. In all such matters the executive is of necessity independent of the judiciary. But when some official act, not necessarily pertaining to the duties of the executive of the state, and which might be performed as well by one officer as another, is directed by law to be done, then any person who clearly shows himself entitled to its performance, and has no other adequate remedy, may have a writ of *mandamus* against such officer, even al-

late and control the legislative department as to set aside

though the law may have designated the chief executive of the state as a convenient officer to perform the duty. We do not think that in such cases there is any ground for distinguishing the chief executive from any other officer who may be designated to do a mere ministerial act, otherwise a party might be entirely without remedy. When, however, the governor is directly empowered or required to do an act, not by statute simply, but, as in this instance, by the constitution of the state, we do not feel authorized to hold that it does not pertain to the office of the chief executive, or that we could compel the performance of this or any other executive duty, prescribed by the organic law." Chamberlain *v.* Sibley, 4 Minn. 309.

There are cases holding, however, that the chief executive is entirely independent of the courts, no matter what the nature of the duty to be performed may be.

"One reason very strongly pressed why the governor is subject to process in cases like the present is, that the act required is not to be done in performance of an executive duty imposed by the constitution, but is in its nature a ministerial act, provided for by statute, and which might, with equal propriety, have been required of an inferior officer, who, beyond question, could have been compelled by *mandamus* to take the necessary and proper action in the premises. And the question is put with some emphasis, whether, when individual interests depend upon the performance of ministerial action, to which the party is entitled of right, the question whether there shall be a remedy or not can depend upon the circumstance that in the particular case the ministerial action is required of a superior officer when there is no reason in its nature why it might not have been required of an inferior.

"A view similar to this has been taken in some cases, and the courts have undertaken to decide what are and what are not properly executive duties, and to assert a right to control the governor's action in some cases, while admitting their want of jurisdiction to do so in others. The State *v.* The Governor, 5 Ohio St. 528; Bonner *v.* Pitts, 7 Geo. 473; Cotton *v.* The Governor, 7 Jones, N. C. 545; Chamberlain *v.* The Governor, 4 Minn. 309; Pacific R. R. *v.* The Governor, 23 Mo. 353; Magruder *v.* The Governor, 25 Md. 173. These cases for the most part are rested upon the *dictum* of Chief Justice Marshall, in Marbury *v.* Madison, 1 Cranch, 137, that one of the heads of department in the federal government might be compelled by *mandamus* to perform a mere ministerial duty; a *dictum* which can not be understood as expressive of the opinion of that eminent judge that the president was subject to the like process, but which is wholly inapplicable to a case like the present, unless it goes to that extent. For it can not justly be claimed, when federal and state governments have been formed, so far as distribution of power is concerned, on the same general plan, that the executive of the union can claim immunity from judicial process any more than the governor of one of the states. In many cases it is unquestionable that

and declare void laws enacted by it, where such laws are

the head of an executive department may be required by judicial process to perform a legal duty, while in other cases, in our judgment, the courts would be entirely without jurisdiction; and, as regards such an officer, we should concede that the nature of the case and of the duty to be performed must determine the right of the court to interfere in each particular instance. When the head of a department acts as a mere assistant or agent of the executive in the performance of a political or discretionary act, he is no more subject to the control of the courts than the chief executive himself; but where a ministerial act is required to be done by him, independently of the executive, though in a certain sense he is an executive officer, it would be as idle to dispute his responsibility to legal process, as it would be to make the same claim to exemption on behalf of an officer entrusted with similar duties of a lower grade. This is emphatically the case under the constitution of this state, which provides for the election of state and inferior officers alike by the people, and makes the chief officers of state below the governor as independent of his control in the performance of their duties as are the officers of the counties or of the townships.

"But when duties are imposed upon the governor, whatever be their grade, importance, or nature, we doubt the right of the courts to say that this or that duty might properly have been imposed upon a secretary of state, or a sheriff of a county, or other inferior officer, and that inasmuch as in case it had been so imposed, there would have been a judicial remedy for neglect to perform it; therefore, there must be the like remedy when the governor himself is guilty of a similar neglect. The apportionment of power, authority, and duty to the governor, is either made by the people in the constitution, or by the legislature in making laws under it; and the courts, when the apportionment has been made, would be presumptuous if they should assume to declare that a particular duty assigned to the governor is not essentially executive, but is of such inferior grade and importance as properly to pertain to some inferior office, and, consequently, for the purposes of their jurisdiction, the courts may treat it precisely as if an inferior officer had been required to perform it. To do this would be not only to question the wisdom of the constitution or the law, but also to assert a right to make the governor the passive instrument of the judiciary in executing its mandates within the sphere of his own duties. Were the courts to go so far, they would break away from those checks and balances of government which were meant to be checks of co-operation, and not of antagonism or mastery, and would concentrate in their own hands something at least of the power which the people, either directly or by the action of their representatives, decided to entrust to the other departments of the government.

"There is as to all the authority specially confided to the governor, whether by the constitution or the laws, no safe or logical doctrine but this: that reasons of a conclusive nature must be presumed to have

in conflict with the constitution.[1] But this is upon the theory, not that the judicial department is superior to the legislative, but that the constitution is superior to both, and that it is the province of the former to construe both the constitution and the statutes, and determine whether there is a conflict. If there is, it is the constitution that controls and limits the legislature, and not the courts.[2]

The legislature can not define the words, or construe the meaning of the constitution, for the courts.[3] But in matters purely political, a construction given by the political department will receive great consideration by the courts, and in case of provisions of doubtful interpretation will generally be followed implicitly.[4]

The several departments are created by and under the same authority, and are, to a certain extent, independent of each other. But each is limited by the constitution, and its authority must be confined within constitutional limits by some power. This power of determining what these constitutional limits are belongs, as a rule, to the courts. But in the performance of certain acts, the executive or legislative departments may be called upon to construe the constitution, and in some cases such construction will be conclusive.[5] Ordinarily, however, the

been found, requiring the particular authority to be confided to the chief executive as one properly and peculiarly, if not exclusively, pertaining to the department which he represents." Sutherland *v.* Governor, 29 Mich. 320, 327. See also 12 Am. & Eng. Enc. of Law, 253. As illustrating the distinctions between these different kinds of acts and duties, see Flournoy *v.* Jeffersonville, 17 Ind. 169, 172; 79 Am. Dec. 468; Tompkins *v.* Little Rock & Ft. S. Ry., 15 Fed. Rep. 6, 16; Pennington *v.* Streight, 54 Ind. 376; Kendall *v.* Stokes, 3 How. 87; Fausler *v.* Parsons, 6 W. Va. 486; 20 Am. Rep. 431, 436; State *v.* Doyle, 40 Wis. 175; 22 Am. Rep. 692; Jones *v.* United States, 137 U. S. 202; 11 Sup. Ct. Rep. 80.

[1] *Ante*, sec. 27; Cooley's Const. Lim., * p. 45; McCauley *v.* Brooks, 16 Cal. 11, 39.

[2] Cooley's Const. Lim., * pp. 43, 44, 45, 46; Baily *v.* Gentry, 1 Mo. 164; 13 Am. Dec. 484.

[3] Cooley's Const. Lim., * pp. 44, 90, 91.

[4] People *v.* Supervisors, 100 Ill. 495, 504.

[5] Cooley's Const. Lim., * p. 41; Whiteman *v.* Wilmington, etc., R. R. Co., 2 Har. (Del.) 514; 33 Am. Dec. 411.

constitutionality of any act of either the executive or legislative department is open to inquiry by the judicial department, and subject to be declared void by the latter, in an action regularly brought, involving the question.[1]

[1] McCauley *v.* Brooks, 16 Cal. 11, 39; Decatur *v.* Paulding, 14 Pet. 497, 575.

"The fourth article of the constitution reads as follows: 'The powers of the government of the State of California shall be divided into three separate departments—the legislative, the executive, and judicial—and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any functions appertaining to either of the others, except in the cases hereinafter expressly directed or permitted.' There is nothing in this distribution of powers which places either department above the law, or makes either independent of the other. It simply provides that there shall be *separate* departments, and it is only in a restricted sense that they are independent of each other. There is no such thing as absolute independence. Where discretion is vested in terms, or necessarily implied from the nature of the duties to be performed, they are independent of each other, but in no other case. Where discretion exists, the power of each is absolute, but there is no discretion where rights have vested under the constitution, or by existing laws. The legislature can pass such laws as it may judge expedient, subject only to the prohibition of the constitution. If it overstep those limits, and attempt to impair the obligation of contracts, or to pass *ex post facto* laws, or grant special acts of incorporation for other than municipal purposes, the judiciary will set aside its legislation and protect the rights it has assailed. Within certain limits it is independent; when it passes over those limits, its power for good or ill is gone.

"The duty of the judiciary is to pronounce upon the validity of the laws passed by the legislature, to construe their language and enforce the rights acquired thereunder. Its judgment in those matters can only be controlled by its intelligence and conscience. From the nature of its duties, its action must be free from coercion. But it is not independent of the legislature in numerous matters materially affecting its action and usefulness. The legislature fixes the places where courts shall be held, determines the number of their terms, and in the regulation of proceedings in civil and criminal cases, provides the manner in which suits shall be brought, prosecutions conducted, appeals taken, and all the vast machinery by which rights are asserted and wrongs redressed. In all these matters, with certain limited exceptions, the judiciary is a dependent department. To the executive department a large and important class of duties is intrusted, in the performance of which its officers are subject to no control. The governor, the head of that department, can recommend such measures as in his judgment will promote the public interest; he can approve or disapprove of such legislation as

The judicial department is not, when the question comes properly before it, bound by the action of another department construing the constitution, but where the action of the other department called for judgment and discretion in the ordinary discharge of official duty, the court can not by *mandamus* act directly upon the officer, or guide and control his judgment or discretion in the matter.[1] The question whether a law is wise or just is a legislative and not a judicial question.[2] The power to appoint officers is an executive and not a legislative power, and, except as to its own officers, can not be exercised by the legislature or other law-making power,

in his opinion may advance or injure the public welfare; he can exercise his discretion in numerous appointments to office; he can grant such reprieves and pardons for all offenses after conviction, except for treason and in cases of impeachment, as he may think proper, and call out the militia when he considers that proceeding necessary, to suppress insurrection or repel invasion. The manner in which he shall exercise these duties rests in his sole discretion. In these matters he is independent of the other departments; but numerous other duties assigned to him arise from legislation in which he may never have participated, or in relation to which he possessed only a qualified negative, and in the performance of which duties he has no discretion, but is subject, like every other citizen, to the law. In the distribution of powers, the constitution only contemplates that different persons shall administer the different departments—that is, for example, that the governor, or other member of the executive department, shall not at the same time be a judge or a member of the legislature. 'When we speak,' says Story, 'of a separation of the three great departments of government, and maintain that that separation is indispensable to public liberty, we are to understand this maxim in a limited sense. It is not meant to affirm that they must be kept wholly and entirely separate and distinct, and have no common link of connection or dependence the one upon the other in the slightest degree. The true meaning is, that the whole power of one of these departments shall not be exercised by the same hands which possess the whole power of either of the other departments; and that such exercise of the whole would subvert the principles of a free constitution.' (Coms. on the Cons., vol. 1, sec. 525.)" Field, J., in McCauley *v.* Brooks, 16 Cal. 39.

[1] Decatur *v.* Paulding, 14 Pet. 497, 515.

[2] Chae Chan Ping *v.* United States, 130 U. S. 581; 9 Sup. Ct. Rep. 623.

unless expressly authorized by the constitution.[1] But both the legislative and judicial departments of government have the power to appoint such officers as are necessary to conduct their business and carry out their general powers and duties.[2] The legislature can not impose upon courts the duty of performing ministerial duties. "Upon judges, as such, no functions can be imposed except those of a judicial nature."[3] Nor can a court or judge be authorized to perform legislative duties.[4] Nor can judicial functions or duties be conferred upon any but courts and judicial officers.[5]

[1] State *v.* Hyde, 121 Ind. 20; 22 N. E. Rep. 644; State *v.* Barbour, 53 Conn. 76; 55 Am. Rep. 65; State *v.* Peelle, 121 Ind. 495; 22 N. E. Rep. 654; City of Evansville *v.* State, 118 Ind. 426; 21 N. E. Rep. 267.

The supreme court of California has held to the contrary. People *v.* Freeman, 80 Cal. 233; 22 Pac. Rep. 173.

[2] *Ante*, sec. 27; State *v.* Hyde, 121 Ind. 20; 22 N. E. Rep. 644; State *v.* Noble, 118 Ind. 361; 21 N. E. Rep. 248.

[3] Cooley's Principles Const. Law, 53; In re Griffiths, 118 Ind. 83; 20 N. E. Rep. 513.

[4] Smith *v.* Strother, 68 Cal. 194; 8 Pac. Rep. 852.

[5] State *v.* Noble, 118 Ind. 361; 21 N. E. Rep. 244.

This question arose in Indiana upon the statute of that state providing for the appointment of commissioners of the supreme court, in which it was provided: "It shall be the duty of such commissioners, under such rules and regulations as the supreme court shall adopt *to aid and assist that court in the performance of its duties.*" The supreme court of Indiana held that this was an attempt to confer upon others than judges the authority to perform judicial functions, and that the statute was unconstitutional for that reason. In a long and thoroughly reasoned opinion, Elliott, C.J., said:

"Thus far we have proceeded upon the theory, and it is the one most earnestly pressed by counsel, that the commissioners are mere assistants of the court, and we have shown that, even on that theory, which for argument's sake we previously conceded to be correct, the act is clearly and undoubtedly unconstitutional. We now deny the validity of the theory, and assert that the defendants have built upon an assumption that can not be sustained. The assumption that the supreme court can perform its judicial duties through the medium of masters in chancery or master commissioners, or persons charged with duties like those performed by masters in chancery and master commissioners, is without foundation. If it can not thus perform judicial duties, it can perform none, for its duty and its power are exclusively judicial. The supreme court must decide for itself all questions of law and of fact. The facts must be gathered from the record by the court itself, and can not be obtained

The question whether a law is in violation of the consti-

from any other source, or by any other persons than the judges. It is a court of errors, an appellate tribunal, charged with the duty of deciding cases upon the record, and this duty can not be performed by deputies. Independently of any constitutional provision this would be so, because judicial powers can not be delegated. This principle has been established for ages. Chancellor Kent thus states this familiar rule: 'The general rule is that judicial offices must be exercised in person, and that a judge can not delegate his authority to another. I do not know of any exception to this rule with us.' 3 Comm. (12th Ed.) 457; Broom, Leg. Max. 841; Campbell *v.* Board, 20 N. E. Rep. 772 (March 26, 1889); Hards *v.* Burton, 79 Ill. 504. Those who are chosen by the people to sit as judges must themselves discharge all the judicial duties of their offices. The trust is imposed upon them, and they can not share their judicial duties with any person. The people have a right to the judgment of those whom they have made judges, and this right the judges can not surrender, if they would, without a flagrant breach of a sworn duty. The trust is a personal one, inalienably invested in the persons selected by the people, and it can not be delegated by the judges themselves, nor by any one else for them. 'It is only the appointed judge,' says Chief Justice Ryan, 'who can speak the authoritative words of the law.' Van Slyke *v.* Insurance Co., 39 Wis. 390. But centuries before, and at a time when the king was the fountain of judicial power theoretically, and sat in the courts of law and equity, Sir Edward Coke even more emphatically stated the rule. Said that 'gladsome light' of jurisprudence, the 'judicature only belongeth to the judges,' 4 Inst. 73. Matthew Bacon said: 'The king himself, though he be intrusted with the whole executive power of the law, can not sit in judgment in any court, but his justice and the laws must be administered according to the power committed to and distributed among his several courts of justice,' 2 Bac. Abr. 619. Again we quote from this high authority, who, speaking of the judges, says: 'They can not act by deputy, nor any way transfer their power to another,' Id. 620. The theory of our governmental system, as embodied in our constitution, requires that the persons to whom the people have intrusted the judicial power shall themselves exercise it, and not intrust its exercise to others. Our constitution expressly so ordains. Its words are these: 'The supreme court shall, upon the decision of every case give a statement in writing of each question arising in the record of such case, and the decision of the court thereon.' Article 7, sec. 5. The decision must be that of the court, and so must be the statement upon each question, 'and the decision thereon.' The power of deciding, the duty of deciding, and the duty of writing the opinions, is specifically imposed upon the court. A duty imposed upon a department of government must be performed by the chosen officers of that department, and it can neither be delegated nor surrendered. Cooley's Const. Lim. (5th Ed.) 116–139. Where a specific duty is imposed upon a tribunal, by that tribunal it must be performed,

tution is purely a judicial question that can not be determined by the legislature.[1]

30. Jurisdiction in summary proceedings.—Many of the proceedings that are classed as summary belong to the in-

without calling any one to perform it, or assist in its performance. Conroe *v.* Bull, 7 Wis. 354; Kearns *v.* Thomas, 37 Wis. 118; Attorney-General *v.* McDonald, 3 Wis. 703. . . .

"Without stopping to quote from the briefs the portions (and many pages are devoted to establishing the proposition) which assert that the commissioners are to be assistants of the court, with powers analogous to those of master commissioners, we declare that whatever view be taken the act is utterly void, for it is, as we have shown, not within the power of the legislature to select assistants to share with the court its duties and functions, nor is it within the power of the legislature to delegate the duty of deciding cases, or of giving decisions expression in writing, to officers or tribunals unknown to the constitution. . . .

"But the act does not establish a court, nor create judges. It is simply an attempt to appoint deputy judges, and a deputy judge is a thing unheard of in jurisprudence, and unknown to the constitution. A plan similar to the one which the act before us professes to outline was recently proposed to the bar of New York, and it was condemned as unconstitutional. The opinion of Mr. Moak, one of the leaders of the bar of that state, that 'new officers not authorized' by the constitution 'can not be created,' was accepted and adopted. In an editorial comment upon the proposed plan, it was said: 'All hands conceded it to be unconstitutional when they came to think of it.' 39 Alb. Law J. 242, 257. . . .

"Our constitution vests the highest appellate jurisdiction of the state in a supreme court, and provides that the number of judges shall not be more than five. There can therefore be no other supreme court than the one established by the constitution, and it must be composed of five judges, and no more. There is consequently no such officer under the constitution as a supreme court commissioner, and there can be no division of the duties of the supreme court and a distribution to any person other than the judges of that court, chosen as the constitution provides. The people have a right to the courts established by and under the constitution, and this constitutional right the legislature can neither alter nor abridge. Constitutional tribunals can not be changed by legislation, and the supreme court is a constitutional court. It can be composed of judges only, for only judges can constitute a court. No part of the judicial duties of that court can be assigned to any other person than one of the duly-chosen judges. The legislature has no power to change its organization, nor can that body, under the guise of creating

[1] In re Ruan St., 132 Pa. St. 257; 19 Atl. Rep. 219, 223.

herent powers of courts, and have been considered elsewhere.[1]

There are many others which are exercised, not through the courts, but by officers upon whom the duty of collecting taxes and other claims due the government or the states is imposed, and which do not fall within the scope of this work.[2]

Other summary proceedings, coming within the jurisdiction of the courts, are almost entirely regulated by statute, and need but little consideration in this connection.

Under the common law of England, debts due the crown were collectible by summary proceedings, not authorized in case of private debts, and it is held that the common law authorizing the collection of debts due the govern-

commissioners, divide the duties of the judges, or authorize it to be done. Under our constitution, as amended, the legislature may establish courts, but it can not destroy the constitutional courts, the circuit courts, and the supreme court, nor can it change their organization, nor redistribute their powers, for these courts owe their organization to the constitution, and, as the constitution has ordained that they shall be organized, so they shall be. Judicial power distributed by the constitution is beyond legislative control." State *v.* Noble, 118 Ind. 361; 21 N. E. Rep. 244, 249.

In California a similar statute was enacted, in which it was provided that: "*It shall be the duty of said commissioners*, under such rules and regulations as said court may adopt, *to assist in the performance of its duties and in the disposition of the numerous causes now pending in said court undetermined.*" There is no material difference between this statute and the Indiana statute above referred to as to the powers conferred upon the commissioners, nor is there any difference material to this question between the constitutions of the two states. But the supreme court of California has held the statute of that state constitutional on the ground that the duties imposed upon the commissioners, by that statute, were not judicial in their nature. People *v.* Hayne, 83 Cal. 111.

An attempt is made in the majority opinion of the court to distinguish the case of State *v.* Noble, *supra*, but the chief justice, in a concurring opinion, concedes it to be in point, as it undoubtedly is. Therefore these two cases are directly opposed to each other, and the Indiana case is certainly more thoroughly and satisfactorily reasoned and seems to be fully supported by both reason and authority.

[1] *Ante*, sec. 27; *post*, sec. 31.

[2] McMillen *v.* Anderson, 95 U. S. 37; Den *v.* Hoboken Land & Imp. Co., 18 How. 272.

ment by summary proceedings, and without resorting to the courts, is not inconsistent with that clause of our constitution which provides that no person shall "be deprived of life, liberty, or property without due process of law," and that congress has power to authorize such collections by summary proceedings and without judicial process or judgment.[1]

Legislation in this country has, at the present day, brought almost all summary proceedings under express statutory provisions, except such as belong to the courts and are beyond legislative control. Therefore, in order to know what the jurisdiction of the courts is in this class of proceedings, one must look to the statutes providing for and regulating the same. It is only necessary to say, generally, that in such proceedings, as they are special and statutory, the courts must pursue the statute strictly in acquiring and exercising jurisdiction.[2]

31. Control of attorneys.—Attorneys are so far officers of the court that they are subject to its control, and may be suspended or removed for misconduct.[3]

Every court has the inherent power to punish attorneys for misconduct affecting the proceedings or process of the court.[4] And this power, on the part of courts of general jurisdiction having authority to admit attorneys to practice, extends to the suspension or disbarment of attorneys.[5] But the legislature may regulate this power and require that, before an attorney shall be removed, certain prescribed proceedings therefor shall be taken, and this has been very generally done. Where the steps necessary to be taken in order to suspend or remove an attorney from the practice are prescribed by statute, these steps must be

[1] Den *v.* Hoboken Land & Imp. Co., 18 How. 272. [2] *Ante*, sec. 20.

[3] Cohen *v.* Wright, 22 Cal. 293, 315; In re Davies, 93 Pa. St. 116; 39 Am. Rep. 729; Ex parte Wall, 107 U. S. 265; 2 Sup. Ct. Rep. 569.

[4] *Ante*, sec. 27.

[5] People *v.* Turner, 1 Cal. 143, 149; 52 Am. Dec. 295; State *v.* Burr, 19 Neb. 593; 28 N. W. Rep. 261; In re Davies, 93 Pa. St. 116; 39 Am. Rep. 729; Bradley *v.* Fisher, 13 Wall. 335.

taken. The court can not proceed arbitrarily or summarily and without reference to the statute.[1] And, whether notice of a proceeding to disbar an attorney is required by statute or not, it has been uniformly held that such notice is necessary.[2]

An attorney may, like any other person, be punished for contempt. In such cases, it is usually held that he can only be punished as other persons may be punished, viz., by fine and imprisonment, but that he can not as a punishment be suspended or disbarred as an attorney.[3] He may, however, be suspended or removed for misconduct, whether such misconduct is such as to constitute a contempt of court or not, and even where the same is not connected with his official conduct as an attorney.[4]

But such suspension or removal, it is held, can not, in such cases, be regarded as a punishment, but rather as relieving the bar and the court of the presence of one shown to be unfit, by reason of his misconduct, to be an attorney.[5]

[1] Ex parte Smith, 28 Ind. 47; State *v.* McClaugherty, 33 W. Va. 250; 10 S. E. Rep. 407.

[2] People *v.* Turner, 1 Cal. 143; 52 Am. Dec. 295; Bradley *v.* Fisher, 13 Wall. 335.

[3] Ex parte Smith, 28 Ind. 47.

[4] Cohen *v.* Wright, 22 Cal. 293, 317; In re Mills, 1 Mich. 392.

[1] People *v.* Turner, 1 Cal. 143, 149; 52 Am. Dec. 295, 300; 1 Lawson's Rights & Rem., sec. 129; Ex parte Wall, 107 U. S. 265; 2 Sup. Ct. Rep. 569.

"Was the order properly made, and a valid determination of the court, which ought not to be disturbed? It does not appear that it was made as a punishment for contempt, and if it were intended as such it could not be supported. The thirteenth section of the act organizing the district courts prescribes fine and imprisonment as a punishment for contempt, and this express provision must be taken as exclusive of all other modes of punishment. Viewed as an adjudication for a contempt, the order is invalid, for inflicting a punishment different from that warranted by the statute, the same as it would have been had it imposed a heavier fine or sentenced to a longer imprisonment than the statute authorizes. Besides, it is not usual for a court to interpose by a proceeding for contempt against an attorney for any act independent of his profession; and it appears, both from the order itself and from the affidavits, that the offenses charged against these parties were not connected with their professional employment as attorneys. The order should, therefore, be regarded as the exercise of a power inherent in

As the power to disbar is inherent in the court, where grounds for disbarment are specified by statute this can not prevent the court from disbarring an attorney for other good grounds.[1] But it is held that an attorney can not, in a proceeding for contempt, be disbarred by a summary order of the court where the proceedings to be taken to disbar an attorney are provided by statute.[2] And in some cases it is held that a court can not disbar for causes not enumerated in the statute.[3]

An attorney may be disbarred for an indictable offense, although no prosecution for such offense has been commenced.[4]

There is some diversity of opinion in the decided cases upon the question whether an attorney can be proceeded against, summarily, for an indictable offense not committed as an attorney, and disbarred, before indictment and conviction. But the weight of authority and reason is clearly in favor of the right of the court to take such course.[5] Nor does the fact that the attorney has been

every court, which has the authority to admit attorneys to practice, of striking their names from the rolls, or, as the order expresses it, of expelling them from the bar, whenever they are guilty of such conduct, either in or out of their profession, as shows them to be be unfit persons to practice it. But where an attorney is proceeded against with this object, he is entitled to have notice of the charges against him, and an opportunity to make his defense. This is not only the dictate of natural justice, and the uniform practice in such cases, but it has been carried into an express adjudication in Ex parte Heyfron, 7 How. (Miss.) 127. In the case at bar, no notice of the charges upon which the order was made was given; no opportunity for explanation, apology, or defense was afforded; the judgment of the court was *ex parte*, and condemned the defendants without a hearing. It is barely necessary to add, that a judgment thus rendered, partaking so strongly of the nature of a criminal proceeding, and so serious in its consequences, can not be supported." People *v.* Turner, 1 Cal. 149.

[1] State *v.* Kirke, 12 Fla. 278; 95 Am. Dec. 314, 333, note; In re Mills, 1 Mich. 392.

[2] Ex parte Smith, 28 Ind. 47.

[3] See note to State *v.* Kirke, 95 Am. Dec. 333, 334.

[4] State *v.* Winton, 11 Or. 456; 50 Am. Rep. 486; Ex parte Wall, 107 U. S. 265, 274; 2 Sup. Ct. Rep. 569; Ex parte Walls, 64 Ind. 461.

[5] A very thorough review of the cases will be found in the opinion of Mr. Justice Bradley in Ex parte Wall, 107 U. S. 265; 2 Sup. Ct. Rep.

tried and convicted of the offense, and pardoned, affect the power of the court to disbar him.[1]

A distinction is made, in some of the cases, between a proceeding to disbar an attorney which affects his right to practice in any and all of the courts of the state, and one to strike his name from the roll of attorneys and revoke his right to practice in that particular court; it being held that in the latter the court may proceed summarily, and without complying with the statute providing for proceedings to disbar attorneys.[2]

The fact that the misconduct complained of was committed in a proceeding before a federal tribunal is no reason why a state court may not, for that cause, disbar the attorney.[3]

569. The fact that the proceeding to disbar has been instituted by a client of the attorney, and the client, having procured a settlement, asks that the proceeding be dismissed, does not deprive the court of the power to proceed with the hearing and disbar the accused.

In re Davis, 93 Pa. St. 116; 39 Am. Rep. 729.

[1] In re Attorney, 86 N. Y. 563.

[2] State *v.* McClaugherty, 33 W. Va. 250; 10 S. E. Rep. 407.

[3] In re O——, 73 Wis. 602; 42 N. W. Rep. 221.

CHAPTER III.

MEANS OF ACQUIRING JURISDICTION.

32. Generally.
33. Due process of law.
34. Appearance and its effects.
35. Nature and different kinds of original process.
36. Requisites of process.
37. Service of process.
38. Constructive service of process.
39. Proof of service of process.
40. Defective process and service.
41. Waiver of process and service and defects therein.
42. Of new parties and amended pleadings.
43. In actions against corporations.
44. Where cross-complaint is filed.

32. Generally.—One of the great principles that underlies and supports our system of government is that no person shall be deprived of his life, liberty or property, without an opportunity to be heard before a lawfully constituted tribunal, and an adjudication against him in the due course of, and according to, the law of the land.[1] Therefore, it is generally held that in order to give a court, or other tribunal or officer, jurisdiction or power to deprive one of life, liberty, or property, or the proper and lawful enjoyment thereof, such person must first have notice, in some form, of the proceedings about to be taken against him or his property.[2]

[1] *Post*, sec. 33; Amend. Const. U. S., art. 5, and art. 14, sec. 1; 1 Black on Judg., secs. 220, 226; Windsor *v.* McVeigh, 93 U. S. 274; In re Gannon, 18 Atl. Rep. 159; Bardwell *v.* Anderson, 44 Minn. 97; 46 N. W. Rep. 315, 317; Flint River Steamboat Co. *v.* Foster, 5 Ga. 194; 48 Am. Dec. 248, 271, note; McVeigh *v.* United States, 11 Wall. 259, 267.

[2] *Ante*, secs. 11–14, 22, 23; *post*, sec. 33: 1 Black on Judg., secs. 215, 220, 227; Stuart *v.* Palmer, 74 N. Y. 183, 190; Bardwell *v.* Anderson, 44 Minn. 97; 46 N. W. Rep. 315; Kentucky Eclectic Inst. *v.* Gaines, 1 S. W. Rep. 444.

And if a defendant has not appeared, and an amended pleading is filed changing the cause of action in any material respect, or alleging a new cause of action, a new notice must be given.[1] It is otherwise where the claim of the plaintiff is not materially changed by the amendment.[2]

The manner in which such notice shall be given, and proof thereof made, are regulated by statutory provisions, and are different in the different states. The mode universally allowed, however, and which is generally required in all cases except upon a showing that it can not be followed, is personal service of notice upon the party to be affected, of the time, place, and object of the proceeding.[3] But, as we have seen elsewhere, the authority of a court can not extend beyond its own territorial jurisdiction, and its process can not go beyond it;[4] therefore it has been found necessary to provide for substituted service where the subject-matter of the action, or proceeding, is within the jurisdiction of the court, but personal service can not be had upon the party whose interests are to be affected, and in some other cases.[5]

What shall be shown in order to authorize this substituted notice, and the kind of notice that shall be given, are provided for and regulated by statutory provisions. The statutes of the United States and of the several states are not alike as to details, but there is a remarkable uniformity in their provisions as to matters of substance.[6]

It is the uniform tendency of the statutes to require personal notice where it can be had, and to compel a very

[1] *Ante*, sec. 13; *post*, sec. 42; Kentucky Eclectic Inst. *v.* Gaines, 1 S. W. Rep. 444; Schuyler Nat. Bank *v.* Bollong, 28 Neb. 684; 45 N. W. Rep. 164.

[2] Schuyler Nat. Bank *v.* Bollong, 28 Neb. 684; 45 N. W. Rep. 164.

[3] *Post*, secs. 33, 35, Nations *v.* Johnson, 24 How. 195; Bardwell *v.* Anderson, 44 Minn. 97; 46 N. W. Rep. 315; Latimer *v.* Union Pac. Ry., 43 Mo. 105; 97 Am. Dec. 378.

[4] *Ante*, sec. 15; *post*, sec. 37; 1 Black on Judg., secs. 217, 227, 228; Latimer *v.* Union Pac. Ry., 43 Mo. 105; 97 Am. Dec. 378.

[5] *Ante*, secs. 11, 12, 13, *post*, sec. 38; Hogle *v.* Mott, 62 Vt. 255; 20 Atl. Rep. 276; Callen *v.* Ellison, 13 Ohio St. 446; 82 Am. Dec. 448.

[6] *Ante*, sec. 14.

clear showing of inability to give such notice in order to procure a substituted or constructive service.[1] The statutory provisions show, also, an intention to furnish, in lieu of personal service, the most effectual substitute that can be had.[1] The courts have shown a like disposition by construing the statutes on the subject with great strictness in favor of the party to be affected.[2]

This right to proceed upon constructive service is not allowed in all cases, even where personal service can not be had. It is never allowed as against a non-resident in an action brought for the sole purpose of recovering a personal judgment, nor can a personal judgment be rendered upon constructive service, although such notice is proper as authorizing some other relief sought in the action.[3]

It is otherwise in case of a resident defendant. Every state has the power to prescribe what notice shall be given its own citizens of proceedings against them, so long as the constitutional inhibition against depriving any person of life, liberty, or property without due process of law, or similar state constitutional provisions, is not infringed.[4] What will amount to an infringement of this constitutional provision, and like provisions in the state constitutions, will be considered elsewhere.[5]

The issuance and service of process is not the only means by which jurisdiction of the person may be obtained. It is necessary that a defendant have notice, but this may be given in other ways than by process if author-

[1] *Post*, sec. 38.

[2] *Ante*, secs. 13, 20, 23; *post*, sec. 38; 1 Black on Judg., sec. 232; Bardwell *v.* Anderson, 44 Minn. 97; 46 N. W. Rep. 315, 317.

[3] *Ante*, secs. 13, 14; *post*, sec. 38; Freeman on Judg., sec. 567; Pennoyer *v.* Neff, 95 U. S. 714; 1 Black on Judg., secs. 220, 221, 223, 227; Beard *v.* Beard, 21 Ind. 321; Price *v.* Hickok, 39 Vt. 292; Lydiard *v.* Chute, 45 Minn. 277; 47 N. W. Rep. 967.

[4] Amend. Const. U. S., art. 5; art. 14, sec. 1; *ante*, secs. 13, 14, 23, 25; *post*, sec. 33; Freeman on Judg., sec. 570; 1 Black on Judg., sec. 227; Beard *v.* Beard, 21 Ind. 321. But see to the contrary cases cited in Freeman on Judg., sec. 570. Also Bardwell *v.* Anderson, 44 Minn. 97; 46 N. W. Rep. 315; *post*, secs. 33, 38.

[5] *Post*, sec, 33.

ized by law. Thus, in some of the states, notice in the nature of a summons, but signed by the attorney of the plaintiff, is authorized. In those states it is held that such notices are not process, but their validity, and the constitutionality of statutes authorizing such notices, is unquestioned.[1] It is not always necessary that notice of any kind shall be given. Such notice as the law requires may

[1] Hanna *v.* Russell, 12 Minn. 43; Porter *v.* Vandercook, 11 Wis. 70; Comet Consolidated Min. Co. *v.* Frost, 15 Colo. 310; 25 Pac. Rep. 506; Nichols *v.* Burlington, etc., Co., 4 G. Greene (Ia.), 42.

"As to the first point raised, that the summons is such a process as must be issued in the name of the people of the state of Colorado, we are strongly inclined to follow the conclusion of the supreme court of Florida in Gilmer *v.* Bird, 15 Fla. 411. In this case the identical question here presented is discussed at some length, that is, 'that the summons, as authorized by the code, is a "process" within the meaning of the constitutional provisions which require the style of all process to be the "State of Florida;" that the summons had no such style; that this was essential to the validity of the judgment, there having been no appearance.' And the court said: 'But is a notice given by an attorney of the institution of a suit in a form familiar to a summons, but not issuing out of a court, a "process" within the meaning of the constitution? Baron Comyn, in giving the definition of the term "process," says it imports the writs which issue out of any court to bring the party to answer, or for doing execution. There is no definition of "process," given by any accepted authority, which implies that any writ or method by which a suit is commenced is necessarily "process." A party is entitled to notice and to a hearing under the constitution before he can be affected, but it is nowhere declared or required that that notice shall be only a writ issuing out of a court.' In Porter *v.* Vandercook, 11 Wis. 70, it was held that 'the summons provided for by the code is not a "writ" or "process" within the meaning of the constitution, art. 7, sec. 17, and need not be in the "name of Wisconsin," nor tested in the name of the presiding judge, nor sealed with the seal of the court.' In Hanna *v.* Russell, 12 Minn. 80 (Gil. 43), the court said: 'But we think a "summons" is not "process" within the meaning of sec. 14, art. 6, of our state constitution. It is merely a notice given by plaintiff's attorney to the defendant that proceedings have been instituted, and judgment will be taken against him if he fail to defend. This notice is not issued out of or under the seal of the court, or by the authority of the court or any judicial officer. The fact that the court acquires jurisdiction by its service does not prove it "process," for it is competent for the legislature to provide that the court shall acquire jurisdiction by the service of the complaint without a summons, or in any other manner by which the defendant may be notified that proceedings have been instituted against him.' In Bailey *v.* Williams, 6 Or. 71, it was held that 'a sum-

be waived by the party entitled to such notice. What is necessary to constitute such waiver is considered elsewhere.[1] The different means by which a court or other tribunal may acquire jurisdiction, has been briefly considered in the chapter on general principles affecting jurisdiction,[2] and will be taken up more minutely, and in detail, in the succeeding sections of this chapter.

33. Due process of law.—The constitution of the United States provides that no state shall deprive any person of life, liberty, or property without due process of law, or deny to any person within its jurisdiction the equal protection of the laws.[3] State constitutions contain similar provisions. The inhibition of the fourteenth amendment applies, in terms, to the states, and renders void any law enacted by a state authorizing the taking of the life, liberty, or property of any person, without due process of law, or the taking thereof by the state itself without such process.[4] But it applies not only to the state, but to every department of it, and prohibits such action by the courts or other tribunals, whether acting under the laws of the state authorizing or attempting to authorize it or not. It is not confined to judicial proceedings, but extends to every case or proceeding which may deprive a citizen of life, liberty, or property, whether the proceeding be judicial, adminis-

mons used to bring a defendant into the circuit court is not "process," and need not run in the name of the state.' In Nichols *v.* Plank-road Co., 4 G. Greene, 44, it was held that 'the notice provided by the code is not a "process," and need not be in the style of the "state of Iowa."' This seems to be the generally accepted conclusion of all courts having a similar code practice, and a similar provision in the constitution, and is, in our judgment, a satisfactory determination of this question." Comet Consolidated Min. Co. *v.* Frost, 15 Colo. 310; 25 Pac. Rep. 506, 507.

[1] *Ante*, secs. 13, 23; *Post*, secs. 34, 41. See also, 1 Black on Judg., sec. 225.

[2] *Ante*, secs. 11–14, 23.

[3] Amd. Const. U. S., art. 5, art. 14, sec. 1.

[4] Cohen *v.* Wright, 22 Cal. 293, 318; People *v.* O'Brien, 111 N. Y. 1; 18 N. E. Rep. 692; Ex parte Ulrich, 42 Fed. Rep. 587.

trative, or executive in its nature.[1] And these provisions of the constitution are alike applicable to laws enacted by congress.[2] The amendment of the constitution, article 5, is a limitation upon the powers of congress and the federal judiciary, and does not apply to the state authorities.[3]

Many attempts have been made to define "due process of law," but no satisfactory definition has been or can be given, although the intent of the constitutional provision has been stated with clearness and accuracy.[4]

[1] Weimer *v.* Bruemburg, 30 Mich. 201; Stuart *v.* Palmer, 74 N. Y. 190; 30 Am. Rep. 289; In re Monroe, 46 Fed. Rep. 52; Davidson *v.* New Orleans, 96 U. S. 97, 101, 107.

[2] Den *v.* Hoboken Land and Imp. Co., 18 How. 272.

[3] Eilenbecker *v.* District Court Plymouth Co., 134 U. S. 31; 10 Sup. Ct. Rep. 424; Nashville, C. & St. L. Ry. Co, *v.* State of Alabama, 128 U. S. 96; 9 Sup. Ct. Rep. 28; Ex parte Ulrich, 42 Fed. Rep. 587, 589.

[4] Davidson *v.* New Orleans, 96 U. S. 97; Chauvin *v.* Valiton, 8 Mont. 451; 20 Pac. Rep. 658; Ex parte Ulrich, 42 Fed. Rep. 587; Lent *v.* Tillson, 140 U. S. 316; 11 Sup. Ct. Rep. 825; Bank of State *v.* Cooper, 24 Am. Dec. 538, note.

"It must be confessed, however, that the constitutional meaning or value of the phrase 'due process of law,' remains to-day without that satisfactory precision of definition which judicial decisions have given to nearly all the other guarantees of personal rights found in the constitutions of the several states and of the United States." Davidson *v.* New Orleans, 96 U. S. 97, 101.

"It is difficult to define with precision the exact meaning and scope of the phrase, 'due process of law.' Any definition which could be given, would probably fail to comprehend all the cases to which it would apply. It is probably wiser, as recently stated by Mr. Justice Miller of the United States Supreme Court, to leave the meaning to be evolved 'by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reason on which such decisions may be founded.' (Davidson *v.* Board of Administrators of New Orleans, 17 Albany Law Journal, 223.) It may, however, be stated generally that due process of law requires an orderly proceeding adapted to the nature of the case in which the citizen has an opportunity to be heard, and to defend, enforce, and protect his right. A hearing or an opportunity to be heard, is absolutely essential. We can not conceive of due process of law without this. In his argument in the Dartmouth College case (4 Wheat. 519), Webster defined 'due process of law' as a proceeding 'which proceeds upon inquiry and renders judgment only after trial.' Mr. Justice Edwards, in Westervelt *v.* Gregg (12 N. Y. 209), defines it as follows: 'Due process of law undoubtedly means in due course of legal proceedings according to those rules and forms which

It has been held that the words "due process of law" were intended to convey the same meaning as the words "by the law of the land" in magna charta.[1] And "law of the land" has been defined as "a general and public law equally binding upon every member of the commu-

have been established for the protection of private rights.' Judge Cooley, in his work on Constitutional Limitations, at page 355, after saying that 'due process of law' is not confined to ordinary judicial proceedings, but extends to all cases where property is sought to be taken or interfered with, says, that 'due process of law in each particular case means such an exertion of the powers of government, as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as these maxims prescribe for the class of cases to which the one in question belongs.' It has always been the general rule in this country, in every system of assessment and taxation, to give the person to be assessed an opportunity to be heard at some stage of the proceeding. That 'due process of law' requires this, has been quite uniformly recognized." Stuart *v.* Palmer, 74 N. Y. 191.

"No court has ever attempted to give a complete or exhaustive definition of the term 'due process of law,' for it is incapable of any such definition. All that can be done is to lay down certain general principles, and apply these to the facts of each case as they arise. Mr. Webster, in his argument in the Dartmouth College case, gave an exposition of the words 'law of the land,' and 'due process of law,' which has often been quoted by the courts with approval, viz: 'The general law, which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial.' In judicial proceedings 'due process of law' requires notice, hearing, and judgment. It does not mean, of course, the general body of the law, common and statute, as it was at the time the constitution took effect; for that would deny to the legislature the power to change or amend the law in any particular. Neither, on the other hand, does 'the law of the land,' or 'due process of law' mean any thing which the legislature may see fit to declare to be such; for there are certain fundamental rights, which our system of jurisprudence has always recognized, which not even the legislature can disregard in proceedings by which a person is deprived of life, liberty, or property; and one of these is notice before judgment in all judicial proceedings. Although the legislature may at its pleasure provide new remedies or change old ones, the power is nevertheless subject to the condition that it can not remove certain ancient landmarks or take away certain fundamental rights, which have been always recognized and observed in judicial procedure." Bardwell *v.* Anderson, 44 Min. 97; 46 N. W. Rep. 315, 317.

[1] Den *v.* Hoboken Land and Imp. Co., 18 How. 272; Davidson *v.* New Orleans, 96 U. S. 97. 101; Ex parte Ulrich, 42 Fed. Rep. 587, 589; Bank of the State *v.* Cooper, 2 Yerg. (Tenn.), 599; 24 Am. Dec. 517, 537, note.

nity;" and, as a law "which embraces all persons who are or may come into like situation and circumstances."[1]

The word "liberty," as used in the constitution, means something more than freedom from actual servitude, imprisonment, or restraint. It includes the right to use one's faculties in all lawful ways, to pursue any lawful trade or avocation and to use his property in all proper ways for his own good.[2]

[1] Dibrell *v.* Morris, 15 S. W. Rep. 87, 92; Bank of State *v.* Cooper, 2 Yerg. (Tenn.), 599; 24 Am. Dec. 517.

[2] In re Jacobs, 98 N. Y. 98, 106; 50 Am. Rep. 636; People *v.* Marx, 99 N. Y. 377, 386; 2 N. E. Rep. 29; dissenting opinion of Mr. Justice Field in Powell *v.* Pennsylvania, 127 U. S. 678; 8 Sup. Ct. Rep. 1257.

"The constitutional guaranty that no person shall be deprived of his property without due process of law may be violated without the physical taking of property for public or private use. Property may be destroyed, or its value may be annihilated; it is owned and kept for some useful purpose, and it has no value unless it can be used. Its capability for enjoyment and adaptability to some use are essential characteristics and attributes without which property can not be conceived; and hence any law which destroys it or its value, or takes away any of its essential attributes, deprives its owner of his property.

"The constitutional guaranty would be of little worth, if the legislature could, without compensation, destroy property or its value, deprive the owner of its use, deny him the right to live in his own house, or to work at any lawful trade therein. If the legislature has the power under the constitution to prohibit the prosecution of one lawful trade in a tenement house, then it may prevent the prosecution of all trades therein. 'Questions of power,' says Chief-Justice Marshall, in Brown *v.* State of Maryland (12 Wheat. 419), 'do not depend upon the degree to which it may be exercised. If it may be exercised at all it must be exercised at the will of those in whose hands it is placed.' Blackstone in his classification of fundamental rights says: 'The third absolute right inherent in every Englishman is that of property which consists in the free use, enjoyment, and disposal of all his acquisitions without any control or diminution, save only by the law of the land.' (1 Com. 138.) In Pampelly *v.* Green Bay Co. (13 Wall. 166, 177), Miller, J., says: 'There may be such serious interruption to the common and necessary use of property as will be equivalent to a taking within the meaning of the constitution.' In Wynehamer *v.* People (13 N. Y. 378, 398), Comstock, J., says: 'When a law annihilates the value of property and strips it of its attributes, by which alone it is distinguished as property, the owner is deprived of it according to the plainest interpretation, and certainly within the constitutional provision intended expressly to shield personal

But at last each case must depend largely upon its own facts, and many times upon the sentiments of the particular court before whom the question arises as to what is necessary to constitute due process of law, and when the

rights from the exercise of arbitrary power.' In People *v.* Otis (90 N. Y. 48), Andrews, J., says: 'Depriving an owner of property of one of its attributes is depriving him of his property within the constitutional provision.'

"So, too, one may be deprived of his liberty and his constitutional rights thereto violated without the actual imprisonment or restraint of his person. Liberty, in its broad sense as understood in this country, means the right, not only of freedom from actual servitude, imprisonment, or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livlihood in any lawful calling, and to pursue any lawful trade or avocation. All laws, therefore, which impair or trammel these rights, which limit one in his choice of a trade or profession, or confine him to work or live in a specified locality, or exclude him from his own house, or restrain his otherwise lawful movements (except as such laws may be passed in the exercise by the legislature of the police power, which will be noticed later), are infringements upon his fundamental rights of liberty, which are under constitutional protection. In Butchers' Union Co. *v.* Crescent City Co. (111 U. S. 746), Field, J., says that among the inalienable rights as proclaimed in the Declaration of Independence 'is the right of men to pursue any lawful business or vocation in any manner not inconsistent with the equal rights of others, which may increase their property or develop their faculties, so as to give them their highest enjoyment. The common business and callings of life, the ordinary trades and pursuits which are innocent in themselves, and have been followed in all communities from time immemorial, must, therefore, be free in this country to all alike upon the same terms. The right to pursue them without let or hindrance, except that which is applied to all persons of the same age, sex and condition, is a distinguishing privilege of citizens of the United States, and an essential element of that freedom which they claim as their birthright.' In the same case Bradley, J., says: 'I hold that the liberty of pursuit, the right to follow any of the ordinary callings of life, is one of the privileges of a citizen of the United States,' of which he can not be deprived without invading his right to liberty within the meaning of the constitution. In Live Stock, etc., Association *v.* Crescent City, etc., Company (1 Abb. U. S. 388, 398), the learned presiding justice says: 'There is no more sacred right of citizenship than the right to pursue unmolested a lawful employment in a lawful manner. It is nothing more nor less than the sacred right of labor.' In Wynehamer *v.* People, Johnson, J., says: 'That a law which should make it a crime for men either to live in, or rent or sell their houses,' would violate the constitutional guaranty of personal liberty. In Bertholf *v.* O'Reilly (74 N. Y. 509, 515), Andrews, J., says that

constitutional provision guaranteeing the right has been violated.[1]

One thing, however, is universally held, viz., that in order to constitute due process of law, in a judicial proceeding, notice, in some form, must be given to the party to be affected.[2] And that, after notice, the party must have an opportunity to be heard before some lawfully constituted body having authority to act in the premises.[3]

It is not enough that a party have notice. There must be some law authorizing it. Notice not authorized by law is no notice.[4]

Therefore, it may safely be said that the constitutional provision under consideration requires: 1. Notice to the party. 2. An opportunity to be heard. 3. That the hearing shall be before a court or other tribunal lawfully organized and vested with authority to act in the premises. 4. That the hearing and determination shall be in accordance with law and established principles.[5]

one could 'be deprived of his liberty in a constitutional sense without putting his person in confinement,' and that a man's right to liberty included 'the right to exercise his faculties, and to follow a lawful avocation for the support of life.'" In re Jacobs, 98 N. Y. 98, 105; 50 Am. Rep. 636.

[1] Bank of State *v.* Cooper, 24 Am. Dec. 538, note.

[2] *Ante*, sec. 32; Stuart *v.* Palmer, 74 N. Y. 183, 190; 30 Am. Rep. 289; Kuntz *v.* Sumption, 117 Ind. 1; 19 N. E. Rep. 474; Hutson *v.* Woodbridge Pro. Dist., 79 Cal. 90; 21 Pac. Rep. 435; Murdock *v.* City of Cinnati, 39 Fed. Rep. 891; Scott *v.* City of Toledo, 36 Fed. Rep. 385; Chauvin *v.* Valiton, 8 Mont. 451; 20 Pac. Rep. 658; Ulman *v.* Mayor, etc., of Baltimore, 20 Atl. Rep. 141; McEneny *v.* Town of Sullivan, 125 Ind. 407; 25 N. E. Rep. 540; Flint River, etc., Co. *v.* Foster, 48 Am. Dec. 271, note; City of Buffalo *v.* Chadeayne, 27 N. Y. St. Rep. 60; 7 N. Y. Sup. 501.

[3] *Ante*, sec. 32; Windsor *v.* McVeigh, 93 U. S. 274; McVeigh *v.* United States, 11 Wall. 259, 267.

[4] Kuntz *v.* Sumption, 117 Ind. 1; 19 N. E. Rep. 474.

[5] Cooley's Const. Lim., * p. 355; Den. *v.* Hoboken Land and Imp. Co., 18 How. 272; Cohen *v.* Wright, 22 Cal. 293, 318; People *v.* O'Brien, 111 N. Y. 1; 18 N. E. Rep. 692; Hutson *v.* Woodbridge Pro. Dist., 79 Cal. 90; 21 Pac. Rep. 435; Parsons *v.* Russell, 11 Mich. 113; 83 Am. Dec. 728, 731, note.

"The principles, then, upon which the process is based are to determine whether it is 'due process' or not, and not any considerations of

But the requirements of the constitution do not necessarily imply a regular proceeding in a court of justice, or after the manner of such courts.[1] The power to proceed against the property of a citizen may, in some cases, be vested in the executive department of the government or some officer or tribunal other than the courts.[2]

The right to collect debts due the government by summary proceedings, and without resort to the courts, is upheld as due process of law.[3] And, in some cases, notice may not be necessary because the law under which an instrument is executed provides that in case of default judgment shall be entered against him and execution issue. For example, where it is provided that where an undertaking on appeal is given, and the judgment appealed from is affirmed, judgment shall be entered against the sure-

mere form. Administrative and remedial process may be changed from time to time, but only with due regard to the landmarks established for the protection of the citizen. When the government through its established agencies interferes with the title to one's property, or with his independent enjoyment of it, and its action is called in question as not in accordance with the law of the land, we are to test its validity by those principles of civil liberty and constitutional protection which have become established in our system of laws, and not generally by rules that pertain to forms of procedure merely. In judicial proceedings the law of the land requires a hearing before condemnation, and judgment before dispossession; but when property is appropriated by the government to public uses, or the legislature interferes to give direction to its title through remedial statutes, different considerations from those which regard the controversies between man and man must prevail, different proceedings are required, and we have only to see whether the interference can be justified by the established rules applicable to the special case. Due process of law in each particular case means, such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs." Cooley's Const. Lim., * p. 356.

[1] Den *v.* Hoboken Land and Imp. Co., 18 How. 272; Davidson *v.* New Orleans, 96 U. S. 97, 102, 107; Chauvin *v.* Valiton, 8 Mont. 451; 20 Pac. Rep. 658; Lent *v.* Tillson, 140 U. S. 316; 11 Sup. Ct. Rep. 825; Speer *v.* Mayor, etc., of Athens, 85 Ga. 49; 11 S. E. Rep. 802.

[2] People *v.* Turner, 117 N. Y. 227; 22 N. E. Rep. 1022.

[3] *Ante*, sec. 30; Den *v.* Hoboken Land and Imp. Co., 18 How. 272.

ties and execution be issued against them. In such and similar cases the law itself is notice to the party that he will, immediately upon default, become liable for the amount for which he has become surety, without further notice, and by executing the instrument the surety consents to the entry of such judgment without notice or other proceeding against him and submits himself to the jurisdiction of the court for that purpose.[1]

So it is held that proceedings to raise the public revenue, by levying and collecting taxes, are not necessarily judicial and within the constitutional inhibition, and that the statute authorizing such proceedings furnishes all the notice that is necessary.[2]

The authority to take property by eminent domain is no exception to the rule that the party whose property is sought to be taken is entitled to notice and hearing.[3] But personal notice is not indispensable.[4]

Due process of law requires notice, hearing, and judgment.[5] But where a court or other tribunal is called upon to decide a matter of pure discretion, upon its own judgment, unaided by evidence, notice is not essential.[6] And subject to constitutional restrictions, and certain general and universally recognized principles and usages, the states have the authority to provide what notice shall be given, and the manner in which it shall be given, as against its own citizens.[7] And it is here that great

[1] Stapp *v.* The Clyde, 44 Minn. 510; 47 N. W. Rep. 160; Ladd *v.* Parnell, 57 Cal. 232; Meredith *v.* S. O. M. A. of Baltimore, 60 Id. 617; Mowry *v.* Heney, 86 Id. 471; 25 Pac. Rep. 17; Flint River, etc., Co. *v.* Foster, 48 Am. Dec. 277, note.

[2] Cincinnati, N. O. & T. P. R. Co. *v.* Kentucky, 115 U. S. 321; 6 Sup. Ct. Rep. 57, 60.

[3] Flint River, etc., Co. *v.* Foster, 48 Am. Dec. 278, note; Mulligan *v.* Smith, 59 Cal. 206, 230.

[4] Cupp *v.* Commissioners, 19 Ohio St. 173.

[5] Bardwell *v.* Anderson, 44 Minn. 97, 46 N. W. Rep. 315, 317.

[6] Kuntz *v.* Sumption, 117 Ind. 1; 19 N. E. Rep. 474; Weaver *v.* Templin, 113 Ind. 298; 14 N. E. Rep. 600.

[7] Kuntz *v.* Sumption, 117 Ind. 1; 19 N. E. Rep. 474; Lent *v.* Tillson, 140 U. S. 316; 11 Sup. Ct. Rep. 825; Stapp *v.* The Clyde, 44 Minn. 510: 45 N. W. Rep. 430; Chavannes *v.* Priestly, 80 Ia. 316; 45 N. W. Rep. 766;

difficulty has arisen. Upon the question as to what notice is sufficient to vest a court, or other tribunal, with authority to deal with the property of a citizen the authorities are numerous and conflicting. That, as against non-residents, nothing less than actual personal service of process upon a party, within the state, will authorize a court to render a personal judgment against him seems to be almost, if not quite, universally accepted as the correct doctrine.[1] And the later decisions hold, not only that a personal judgment, binding upon a non-resident party and his property generally, can not be rendered without actual personal notice, within the state, but that such a judgment can not be made binding *as a personal judgment* upon property of his within the jurisdiction of the court.[2]

Whether a state has authority to authorize personal judgments against its own citizens upon constructive notice is a question about which the decisions are conflicting. The weight of authority, and the better reason, seems to be that a state has the power to provide what notice shall be given in proceedings against its own citizens, and that so long as *some* notice is provided for the constitution of the United States is not violated, and the question as to the sufficiency of the notice can not be inquired into.[3]

In many cases, and particularly in the matter of assessments for public improvements, it is held to be sufficient if a general notice to all persons is provided for.[4] Some of the authorities seem to go to the extent of holding that a state has the power to provide for the taking of the property of its own citizens without any notice.[5] But there is no principle of law or justice upon which any

Caldwell *v.* State, 137 U. S. 692; 11 Sup. Ct. Rep. 224; Hogle *v.* Mott, 62 Vt. 255; 20 Atl. Rep. 276; McEneney *v.* Town of Sullivan, 125 Ind. 407; 25 N. E. Rep. 540; Flint River, etc., Co. *v.* Foster, 48 Am. Dec. 272, note.

[1] *Ante*, secs. 13, 23; *post*, sec. 38; Flint, River, etc., Co. *v.* Foster, 48 Am. Dec. 273, note.

[2] *Ante*, sec. 32; *post*, sec. 38; Freeman on Judg., sec. 567; Pennoyer *v.* Neff, 95 U. S. 714.

[3] *Ante*, sec. 32; *post*, sec. 38.

[4] McEneney *v.* Town of Sullivan, 125 Ind. 407; 25 N. E. Rep. 540.

[5] 1 Black on Judg., sec. 221, and cases cited.

such authority can rest. And in some of the cases the doctrine that a state can authorize personal judgments against its own citizens without actual personal notice is strongly combatted and wholly denied.[1] But the authority to provide for constructive service where a resident citizen of a state conceals himself, or can not be found, has never been denied, nor has the right to provide for service of process by leaving a copy at the last place of residence of a citizen of a state been disputed. And this is not actual or personal service. This is justified on the ground of necessity. But who is to determine when the necessity for constructive service exists, or the expediency of providing for constructive service, if not the legislature? And if the legislature has the power to provide for it in one class of cases, why not in all. The ground upon which it is usually held that the law-making power can not pro-

[1] Bardwell *v.* Anderson, 44 Minn. 97; 46 N. W. Rep. 315.

"As a substitute for the means formerly resorted to in England in such cases, most of the American states have adopted service of the process or summons by publication. But we have found no statute, except the one now under consideration, which has assumed to authorize such a mode of service, and have found no case where its validity has been sustained by the courts, except as to defendants who could not be found within the jurisdiction either because of non-residence, or because they had absconded or concealed themselves to avoid the service of process. We think this will be found true in every instance, from the earliest decisions on the subject down to the latest utterance of the Supreme Court of the United States in Arndt *v.* Griggs, 10 Sup. Ct. Rep. 557, in which that court took occasion to set at rest some misapprehensions as to the scope of their previous decision in Hart *v.* Sansom, 110 U. S. 151, 3 Sup. Ct. Rep. 586. We think it would be a surprise to the bench and the bar of the country if it should be held that process or summons in ordinary civil actions might be served on resident defendants, present and capable of being found within the jurisdiction of the court, merely by publication in a newspaper. The dangers and abuses that would arise from such a practice are too apparent to require to be named or even suggested. So radical a departure is this from the uniform and well-established ideas of what constitutes due process of law in such cases, that although this act has been on the statute books for twenty-four years, we doubt whether one lawyer in twenty is aware of its existence, and we have yet to hear of any case, except the present, where any one has ventured to act upon it." Bardwell *v.* Anderson, 44 Minn. 97; 46 N. W. Rep. 315.

vide for constructive service when personal service can be had, is that while the legislature may change the forms of process from time to time, it must be done "with due regard to the landmarks established for the protection of the citizen."[1] And that the right to actual personal notice has from time immemorial been recognized as one of these landmarks, and "fundamental rights which have been always recognized and observed in judicial procedures."[2]

But if this be so, many of the proceedings in probate, and other similar proceedings by which the title to property of persons residing within the jurisdiction of the court may be taken away on merely constructive service, must be held to be void on the same principle. There can be no difference in principle, in this respect, between a judgment against the person which may be enforced against the property of a citizen, and one that acts directly upon his property. And yet it is presumed that the right to proceed against the property of a resident citizen upon constructive notice in many cases will not be controverted. But this is a question that, so for as it applies to personal judgments in common-law actions, must be regarded as an open one, for the very good reason that the law makers, whatever their powers may be, have rarely attempted to take away the right to personal service where it can reasonably be had. It is conceded, however, that a large discretion is vested in the legislature as to the notice to be required and the forms of procedure, depending upon the laws, habits, customs and preferences of the people of each state, and the nature and objects of the proceedings provided, and the reasonableness of the notice under the circumstances.[3]

[1] Cooley's Const. Lim., * p. 356.

[2] Bardwell *v.* Anderson, 44 Minn. 97; 46 N. W. Rep. 315.

[3] Davidson *v.* New Orleans, 96 U. S. 97, 107; Dent *v.* West Va., 129 U. S. 114; 9 Sup. Ct. Rep. 231; Alexander *v.* Archer, 24 Pac. Rep. 373; McCauley *v.* Fulton, 44 Cal. 355; Lent *v.* Tillson, 72 Cal. 404; 14 Pac. Rep. 71; Davies *v.* Los Angeles, 86 Cal. 37; 24 Pac. Rep. 771; Lent *v.* Tillson, 140 U. S. 316; 11 Sup. Ct. Rep. 825; Speer *v.* Mayor, etc., of Athens, 85 Ga. 49; 11 S. E. Rep. 802; Hogle *v.* Mott, 62 Vt. 255; 20 Atl.

And if the procedure is in accordance with the law

Rep. 276; Mutual Life Ins. Co. *v.* Pinner, 43 N. J. E. 52; 10 Atl. Rep. 184.

In Davidson *v.* New Orleans, 96 U. S. 107, it was said by Mr. Justice Bradley in a concurring opinion:

"It seems to me that private property may be taken by a state without due process of law in other ways than by mere direct enactment, or the want of a judicial proceeding. If a state, by its laws, should authorize private property to be taken for public use without compensation (except to prevent its falling into the hands of an enemy, or to prevent the spread of a conflagration, or in virtue of some other imminent necessity, where the property itself is the cause of the public detriment), I think it would be depriving a man of his property without due process of law. The exceptions noted imply that the nature and cause of the taking are proper to be considered. The distress-warrant issued in the case of Murray's Lessee et al. *v.* Hoboken Land and Improvement Co. (18 How. 272) was sustained, because it was in consonance with the usage of the English government and our state governments in collecting balances due from public accountants, and hence was 'due process of law.' But the court in that case expressly holds that 'it is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative, as well as on the executive and judicial power of the government, and can not be so construed as to leave congress free to make any process "due process of law" by its mere will' (p. 276). I think, therefore, we are entitled, under the fourteenth amendment, not only to see that there is some process of law, but 'due process of law' provided by the state law when a citizen is deprived of his property; and that, in judging what is 'due process of law,' respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or none of these; and if found to be suitable or admissible in the special case, it will be adjudged to be 'due process of law;' but if found to be arbitrary, oppressive and unjust, it may be declared to be not 'due process of law.' Such an examination may be made without interfering with that large discretion which every legislative power has of making wide modifications in the forms of procedure in each case, according as the laws, habits, customs, and preferences of the people of the particular state may require."

And in Dent *v.* West Virginia, 129 U. S. 114 (9 Sup. Ct. Rep. 231), Mr. Justice Field, in delivering the opinion of the court, said:

"As we have said on more than one occasion, it may be difficult, if not impossible, to give to the terms 'due process of law' a definition which will embrace every permissible exertion of power affecting private rights, and exclude such as are forbidden. They come to us from the law of England, from which country our jurisprudence is to a great extent derived, and their requirement was there designed to secure the

and settled practice of the state operating on all alike, it is not in violation of the constitution.[1] Therefore, where a party is not by the law and settled practice of a state entitled to a trial by jury, in a common law case, to deny him such a trial does not deprive him of his rights with-

subject against the arbitrary action of the crown, and place him under the protection of the law. They were deemed to be equivalent to 'the law of the land.' In this country the requirement is intended to have a similar effect against legislative power; that is, to secure the citizen against any arbitrary deprivation of his rights, whether relating to his life, his liberty, or his property. Legislation must necessarily vary with the different objects upon which it is designed to operate. It is sufficient, for the purposes of this case, to say that legislation is not open to the charge of depriving one of his rights without due process of law, if it be general in its operation upon the subjects to which it relates, and is enforceable in the usual modes established in the administration of government with respect to kindred matters; that is by process or proceedings adapted to the nature of the case. The great purpose of the requirement is to exclude every thing that is arbitrary and capricious in legislation affecting the rights of the citizen. As said by this court in Yick Wo *v.* Hopkins, speaking by Mr. Justice Matthews: 'When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power.' 118 U. S. 356, 369; 6 Sup. Ct. Rep. 1064. See also, Pennoyer *v.* Neff, 95 U. S. 714, 733; Davidson *v.* New Orleans, 96 U. S. 97, 104, 107; Hurtado *v.* California, 110 U. S. 516; 4 Sup. Ct. Rep. 111; Railroad Co. *v.* Humes, 115 U. S. 512, 519; 6 Sup. Ct. Rep. 110."

[1] Holman *v.* Manning, 65 N. H. 228; 19 Atl. Rep. 1002; Caldwell *v.* State, 137 U. S. 692; 11 Sup. Ct. Rep. 224.

In Caldwell *v.* State, 137 U. S. 692; 11 Sup. Ct. Rep. 226, the court, speaking through Mr. Chief Justice Fuller, said:

"By the fourteenth amendment the powers of the states in dealing with crime within their borders are not limited, but no state can deprive particular persons or classes of persons of equal and impartial justice under the law. Law, in its regular course of administration through courts of justice, is due process, and when secured by the law of the state, the constitutional requisition is satisfied. 2 Kent's Comm. 13. And due process is so secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice. Bank *v.* Okely, 4 Wheat. 235, 244. The power of the state must be exerted within the limits of those principles, and its exertion can not be sustained when special, partial, and arbitrary. Hurtado *v.* California, 110 U. S. 516, 535; 4 Sup. Ct. Rep. 111, 292."

out due process of law.[1] Where the property proceeded against is within the jurisdiction of the court publication of notice to a non-resident owner is due process of law.[2] It is usually held that a special appearance entered for the purpose of questioning the jurisdiction of the court does not bring the defendant into court for other purposes or waive his right to question the jurisdiction of the court thereafter.[3] But it has been held that a statute providing that such an appearance by a non-resident defendant is a voluntary appearance, which brings him into court for all purposes, is not unconstitutional.[4] But this is put upon the rather remarkable ground that the mere entry of a judgment for money, which is void for want of jurisdiction, there being no proper service, affects neither the liberty nor property of a defendant, and that it is only when process is issued thereon, or the judgment is sought to be enforced that liberty or property is in present danger.[5] It is to be inferred from this that while the statute is held not to violate the constitution, it was regarded by the court as inoperative for the purpose for which it was enacted, and that a judgment entered upon a special appearance would be invalid if the service was in fact insufficient to give jurisdiction. If, however, such a statute has the effect to give the same jurisdiction to the court by such special appearance as a general appearance would give this would undoubtedly render the judgment valid, and it could not be attacked for want of jurisdiction at a subsequent time if attempted to be enforced.[6]

The legislature can not authorize an injunction against

[1] Walker *v.* Sauvinet, 92 U. S. 90; Holman *v.* Manning, 65 N. H. 228; 19 Atl. Rep. 1002.

[2] *Post*, sec. 38; Huling *v.* Kaw Val. Ry. & Imp. Co., 130 U. S. 559; 9 Sup. Ct. Rep. 603.

[3] *Ante*, sec. 22; *post*, sec. 34.

[4] York *v.* State of Texas, 137 U. S. 15; 11 Sup. Ct. Rep. 9; Kaufman *v.* Wooters, 138 U. S. 285; 11 Sup. Ct. Rep. 298.

[5] Id.

[6] York *v.* State, 73 Tex. 651; 11 S. W. Rep. 869; Cunningham *v.* State, 11 S. W. Rep. 871.

the use of one's property without a showing that such user is or will be wrongful or injurious, or make that wrongful and injurious, by a statutory declaration to that effect, which is not so as a matter of fact;[1] or compel a corporation to make compensation for injuries done to property in the prosecution of its lawful business, without any wrong, fault, or neglect on its part, when under the general law of the land no one else is so liable.[2]

But the legislature may require the road of a railroad company to be fenced, and make the failure to fence conclusive evidence of negligence where stock is killed in the operation of its road.[3] It is held, however, that where there is no law requiring a railroad company to maintain a fence, a law making its liability for stock killed to depend upon whether a fence has been maintained or not, is unconstitutional.[4]

The legislature may provide what amount of damages may be recovered in excess of the value of cattle killed by a railroad company, where it has failed to fence as required by statute.[5]

It is not always necessary that opportunity be given a party to be heard before action taken against his property. In some cases, for example in cases of assessment against property, for public improvements and the like, it is sufficient if a party is given the right to have the validity of such assessment judicially determined at a subsequent time.[6] But a statute making the action of any officer or

[1] City of Janesville *v.* Carpenter, 77 Wis. 288; 46 N. W. Rep. 128.

[2] Cottrell *v.* Union Pac. Ry. Co., 21 Pac. Rep. 416; Jenson *v.* Union Pac. Ry. Co., 21 Pac. Rep. 994; Bielenberg *v.* Montana U. Ry. Co., 8 Mont. 271; 20 Pac. Rep. 314.

[3] Thorpe *v.* Rutland & B. R. Co., 27 Vt. 140; 62 Am. Dec. 625; Minneapolis & St. L. Ry. Co. *v.* Beckwith, 129 U. S. 26; 9 Sup. Ct. Rep. 207; Missouri Pac. Railway Co. *v.* Humes, 115 U. S. 512; 6 Sup. Ct. Rep. 110; Sullivan *v.* Oregon Ry. & Nav. Co., 19 Or. 319; 24 Pac. Rep. 408.

[4] Oregon Ry. & Nav. Co. *v.* Smalley, 1 Wash. St. 206; 23 Pac. Rep. 1008.

[5] Missouri Pac. Ry. Co. *v.* Humes, 115 U. S. 512; 6 Sup. Ct. Rep. 110.

[6] McMillen *v.* Anderson, 95 U. S. 37; State *v.* Certain Lands, 42 N. W. Rep. 473.

tribunal conclusive, and not providing for notice and opportunity to be heard before action taken, is void.[1]

Sometimes, in cases of assessments for taxes and the like, it is sufficient to give notice to the public generally of the action proposed to be taken. But such a notice is not sufficient where action is to be taken against some individual tax-payer, and affecting his property alone. Therefore a statute authorizing such individual action upon a general notice to the public, is void.[2]

There are certain police powers belonging to the states, by virtue of which they may regulate the transaction of business, and the use of property, for the common good; and so long as any interference by the state with the business or property of a citizen is within such police powers, it is not a taking of property without due process of law.[3]

To what extent a state may go in the exercise of its police powers without violating this and other constitutional provisions, can not be stated with any accuracy. Each case must necessarily stand upon the evils to be avoided, the necessities of the case, and the circumstances surrounding it. Without attempting a review of the cases, some of them are cited in the foot-note as illustrating the doctrine and the extent to which it has been carried.[4]

It is held that if the proceeding is such that at common law a party would have been entitled to a trial by jury, to

[1] Chicago, M. & St. P. Ry. Co. *v.* State of Minnesota, 134 U. S. 418; 10 Sup. Ct. Rep. 462.

[2] Kuntz *v.* Sumption, 117 Ind. 1; 19 N. E. Rep. 474.

[3] State *v.* Forcier, 65 N. H. 42; 17 Atl. Rep. 577.

[4] Louisville & N. R. Co. *v.* Baldwin, 85 Ala. 619; 5 So. Rep. 311; Eilenbecker *v.* District Court of Plymouth Co., 134 U. S. 31; 10 Sup. Ct. Rep. 424; People *v.* D'Oench, 18 N. E. Rep. 862; Minneapolis & St. L. Ry. Co. *v.* Beckwith, 129 U. S. 26; 9 Sup. Ct. Rep. 207; Western U. Tel. Co. *v.* Mayor of N. Y., 38 Fed. Rep. 552; People *v.* Budd, 117 N. Y. 1; 22 N. E. Rep. 670; Butler *v.* Chambers, 36 Minn. 69; 30 N. W. Rep. 308; Thorpe *v.* Rutland & B. R. Co., 27 Vt. 140; 62 Am. Dec. 625. Rodemacher *v.* Mil. & St. P. Ry. Co., 41 Ia. 297; 20 Am. Rep. 592; Sullivan *v.* Oregon Ry. & Nav. Co., 19 Or. 319; 24 Pac. Rep. 408; In re Le Sing, 43 Fed. Rep. 359; Jamieson *v.* Indiana Nat. Gas Co., 128 Ind. 555; 28 N. E. Rep. 76; People *v.* Cipperly, 4 N. E. Rep. 107, note; Yick Wo *v.* Hopkins, 118 U. S. 356; 6 Sup. Ct. Rep. 1064.

deny him such a trial is to proceed against him, or his property, without due process of law.[1] But, as we have seen, this is not necessarily so. If, as is shown above in this section, a jury trial can not, according to the law and settled practice of the state, be demanded, it is not a violation of the constitution of the United States to deny such right to any particular litigant. But if the general law of the state gives the right to a trial by jury, a statute denying the right to any person or class of persons is clearly unconstitutional, not so much because it deprives the party of due process of law, as that it denies to him the equal protection of the law. And, whatever may be the rule in the state courts, a common-law and equitable cause of action can not be joined or blended in the same action in the federal courts, and a party be thus deprived of his right to a trial by jury, although such a proceeding is authorized in the state courts by the laws of the state in which the federal court is situated.[2]

The guaranty of the right of a party, charged with crime, to a trial by jury, found in the federal and state constitutions, is usually held to apply to such crimes, including certain misdemeanors, as were triable by jury at common law.[3]

The legislature of a state can not, by law, deprive a party of the right to resort to the courts for an adjudication of his rights.[4] But such right may be limited to a reasonable extent, especially as to the time when his rights shall be asserted in the courts.[5]

So a state may limit the number of new trials that may

[1] Dacres *v.* Oregon Ry. & Nav. Co., 1 Wash. St. 525; 20 Pac. Rep. 601; Scott *v.* Neely, 140 U. S. 106; 11 Sup. Ct. Rep. 712; Bank of State *v.* Cooper, 2 Yerg. (Tenn.) 599; 24 Am. Dec. 517; Callan *v.* Wilson, 127 U. S. 540; 8 Sup. Ct. Rep. 1301.

[2] Scott *v.* Neely, 140 U. S. 106; 11 Sup. Ct. Rep. 712.

[3] Callan *v.* Wilson, 127 U. S. 540; 8 Sup. Ct. Rep. 1301; People *v.* Powell, 87 Cal. 348; 25 Pac. Rep. 481; Cooley's Const. Lim., * p. 319; Stuart *v.* Kimball, 43 Mich. 448.

[4] Barron *v.* Burnside, 121 U. S. 186; 7 Sup. Ct. Rep. 931.

[5] Trimble *v.* M'Gee, 112 Ind. 370; 14 N. E. Rep. 83; Wheeler *v.* Jackson, 137 U. S. 245; 11 Sup. Ct. Rep. 76.

be granted to the same party in the same action, because of the insufficiency of the evidence, but not where there is no evidence to justify the finding or verdict or where there has been error of law.[1] And a remedy may be taken away by legislation where another remedy is available.[2]

Where one is imprisoned by virtue of a judgment of commitment of a court or judge not having legal authority or jurisdiction to render the same, he is deprived of his liberty without due process of law.[3]

So where an indictment is found by a grand jury impaneled by a court that has no legal power to impanel a grand jury.[4] But a judgment rendered by a *de facto* judge of a *de jure* court is not invalid.[5] Nor can a judgment of a state court be attacked as depriving a party of his property without due process of law for mere error.[6]

Indictment or presentment by a grand jury where a party is charged with a crime is not essential to due process of law in the state courts.[7] But whether the power to prosecute by information, by a district attorney or other prosecuting officer, can be vested in such officer without any preliminary hearing or investigation, or a finding of probable cause, is very much doubted though the question has not been determined.[8]

The guaranty of the federal constitution against accusation of capital or infamous crime, except by indictment or presentment by a grand jury, and for an impartial trial by a jury when thus accused, apply only to citizens and

[1] Louisville & N. R. Co. *v.* Woodson, 134 U. S. 614; 10 Sup. Ct. Rep. 628.

[2] Eddy *v.* Township of Lee, 73 Mich. 123; 40 N. W. Rep. 792; Lake Sup. Ship Canal Ry., etc., Co. *v.* School District, 79 Mich. 351; 44 N. W. Rep. 616; Quill *v.* Indianapolis, 124 Ind. 292; 23 N. E. Rep. 788.

[3] In re Monroe, 46 Fed. Rep. 52; In re Kelly, 46 Fed. Rep. 653.

[4] Ex parte Farley, 40 Fed. Rep. 66.

[5] *Ante*, sec. 28; Manning *v.* Weeks, 139 U. S. 504; 11 Sup. Ct. Rep. 624.

[6] Marrow *v.* Brinkley, 129 U. S. 178; 9 Sup. Ct. Rep. 267; Davis *v.* State, 139 U. S. 651; 11 Sup. Ct. Rep. 675.

[7] Hurtado *v.* People, 110 U. S. 516; 4 Sup. Ct. Rep. 111, 295; In re Humason, 46 Fed. Rep. 388; Rowan *v.* State, 30 Wis. 129, 144; 11 Am. Rep. 559.

[8] In re Humason, 46 Fed. Rep. 388.

others within the United States, or who are brought there for trial for alleged offenses committed abroad, and has no operation in another country although the trial of the accused may be had in a foreign country before a tribunal created by and acting under the laws of the United States, and under treaty with such foreign country.[1]

The trial and commitment of one who has already been tried and acquitted of the same offense is depriving him of his liberty without due process of law.[2]

The states have the power to change the procedure, and the remedy, and the courts to which resort may be had to enforce one's rights; and such changes, made after the cause of action arose, do not, unless they deprive a party of some substantial right already vested, deprive him of due process of law.[3] So new rules of evidence, that do not destroy or affect vested interests, may be established.[4]

A statute depriving a party of the right to transmit his property by inheritance deprives him of his property without due process of law.[5]

A statute authorizing one who has made improvements in the channel of a river to charge tolls for the use of the river thus improved, is not an imposition of a tax upon persons using the river or a taking of their property without due process of law.[6]

Nor does the prohibition of the manufacture of intoxicating liquors, or any other article or commodity which has the effect to render the property of one engaged in

[1] Ross *v.* McIntyre, 140 U. S. 453; 11 Sup. Ct. Rep. 897.

[2] Ex parte Ulrich, 42 Fed. Rep. 587.

[3] State *v.* Jackson, 105 Mo. 196; 16 S. W. Rep. 829; Cooley's Const. Lim., * p. 272; Caldwell *v.* State, 28 Tex. App. 566; 14 S. W. Rep. 122; Rowan *v.* State, 30 Wis. 129, 144; 11 Am. Rep. 559; Wolf *v.* State, 19 Ohio St. 248, 254; Louisville, N. A. & C. Ry. Co. *v.* Wallace, 26 N. E. Rep. 493.

[4] People *v.* Ryder, 12 N. Y. Sup. 48; 58 Hun, 407; People *v.* Eddy, Id. 628; 59 Hun, 615.

[5] Debrell *v.* Morris, 15 S. W. Rep. 87.

[6] Sands *v.* Manistee River Imp. Co., 123 U. S. 228; 8 Sup. Ct. Rep. 113.

such manufacture useless, or less valuable, amount to a taking of such property without due process of law.[1]

34. Appearance and its effects.—Appearance is the coming into court as a party to a suit either in person or by attorney or other person authorized to enter or make such appearance.[2]

It may be general, which is a submission of the person to the jurisdiction of the court for all purposes of the action,[3] or special, for the purpose of questioning the jurisdiction of the court, which submits the person to the jurisdiction of the court, only so far as to authorize it to rule upon the question raised, whether it be presented by motion or by pleading to the jurisdiction.[4]

It may also be either voluntary, where it is entered freely, compulsory, where it is compelled by plaintiff's action, or optional, where it is made by one not called upon to appear, but who applies to do so to save a right.[5]

An appearance may be in person, by attorney, by next friend, by guardian, or by committee, depending upon whether the party himself defends, or employs, or is represented by, another.[5]

A party enters a general appearance when he enters the same on the records of the court, or causes it to be done, without qualifying the appearance, or limiting it to a purpose for which a special appearance is permitted, or by entering bail, demurrer, answer to the merits, or any other act admitting that the party is in court submitting to the jurisdiction.[6]

[1] Mugler *v.* Kansas, 123 U. S. 623; 8 Sup. Ct. Rep. 273; Powell *v.* Pennsylvania, 127 U. S. 678; 8 Sup. Ct. Rep. 992, 1257.

[2] Anderson's Dic. of Law, 65; *ante*, sec. 13. [3] *Ante*, secs. 13, 22.

[4] *Ante*, secs. 13, 22; Kinkade *v.* Myers, 17 Or. 470; 21 Pac. Rep. 557; Williamson *v.* McCormick, 126 Pa. St. 274; 17 Atl. Rep. 591.

[5] Anderson's Dic. of Law, 65.

[6] Anderson's Dic. of Law, 65; Grantier *v.* Rosecrance, 27 Wis. 488, 491; German Mut., etc., Fire Ins. Co. *v.* Decker, 74 Wis. 556; 43 N. W. Rep. 500; Lyons *v.* Planters' Loan and Savings Bank, 86 Ga. 485; 12 S. E. Rep. 882.

So where a party consents to the making of an order by the court.[1] But in order to constitute an appearance the act must be done in court. The filing of a motion out of term time, and never brought before the court, is not an appearance.[2] And it must be the act of the party or his attorney. An entry by the clerk that some act has been done that would constitute an appearance may be evidence of the fact, but it is not the act itself.[3]

Whether an appearance for the removal of a cause from a state court to a federal court is such an appearance as will give jurisdiction and waive want of, or defects in, service, is left in uncertainty by the decisions of the federal courts. It was held under the twelfth section of the judiciary act of 1789 that by petitioning for a removal the defendant waived service of process.[4]

Under the later removal acts it is held in some of the cases that a party does not, by appearing specially in the state court for that purpose, and filing his petition and bond for removal, cut off his right to contest the sufficiency of the service in the federal court.[5]

In others, it is held that the party must, in order to save his right to contest the service, or the jurisdiction of the court for want of service, first make his objection in the state court before asking for the removal, and if he does not his appearance and petitioning for such removal waives the objection.[6]

With the authorities in this uncertain state it is impossible to say what conclusion will be finally reached. It seems to be settled, however, that if the objection to the service is properly made in the state court, a subsequent

[1] Auspach *v.* Ferguson, 71 Ia. 144; 32 N. W. Rep. 249.

[2] Todd *v.* De La Mott, 9 Col. 222; 11 Pac. Rep. 90.

[3] Rhoades *v.* Delaney, 50 Ind. 468; 1 Black on Judg., sec. 225.

[4] Sayles *v.* Insurance Co., 2 Curt. 212; Bushnell *v.* Kennedy, 9 Wall. 387; Reifsnider *v.* American Imp. Pub. Co., 45 Fed. 433.

[5] Atchison *v.* Morris, 11 Fed. Rep. 582; Small *v.* Montgomery 17 Fed. Rep. 865; Reifsinder *v.* American Imp. Pub. Co., 45 Fed. Rep. 433, and cases cited; Clews *v.* Woodstock Iron Co., 44 Fed. Rep. 31; Hendrickson *v.* Railroad Co., 22 Fed. Rep. 569; Perkins *v.* Hendryx, 40 Fed. Rep. 657.

[6] Tallman *v.* Baltimore & O. R. Co., 45 Fed. Rep. 156, and cases cited.

application for removal will not deprive the party of the right to renew it in the federal court.[1] It was held in one case that a formal appearance by a defendant in a federal court, entered on the first rule day, followed on the second rule day by an objection that he was sued in the wrong district, was not, under the circumstances, such an appearance as would waive service of process.[2] But the doctrine laid down in this case has been expressly repudiated, with the statement that with the exception of that case no authority in support of it is found in the decisions of the federal courts.[3] A party may, in a proper case, be permitted to amend his notice of appearance so as to change it from a general to a special appearance.[4] Where a motion which attacks the jurisdiction of the court over the person, made upon a special appearance for that purpose, is pending, and the party pleads to the merits, or does any other act that amounts to a general appearance, his pending objection to the jurisdiction of the court is waived.[5] And the subsequent withdrawal of such pleading does not affect the question. The filing of the pleading vests the court with jurisdiction, and it can not be taken away by withdrawing the pleading, although done with the leave of the court.[6] A party may, by his conduct, be estopped to deny that he is or was in court.[7] Not only is the want of proper service of process waived by a general appearance, but the objection that the party is not within the territorial jurisdiction of the court in a transitory action is waived in the same way.[8] In some states it is so provided

[1] Kauffman *v.* Kennedy, 25 Fed. Rep. 785; Miner *v.* Markham, 28 Fed. Rep. 387; Hendrickson *v.* Chicago, R. I. & P. Ry. Co., 22 Fed. Rep. 569.

[2] Reinstadler *v.* Reeves, 33 Fed. Rep. 308.

[3] Foote *v.* Massachusetts Ben. Ass'n, 39 Fed. Rep. 23.

[4] Hohorst *v.* Hamburg, etc., Packet Co., 38 Fed. Rep. 273.

[5] Evans *v.* Iles, 7 Ohio St. 234; Denver & R. G. Ry. Co. *v.* Neis, 10 Colo. 56; 14 Pac. Rep. 105.

[6] Evans *v.* Iles, 7 Ohio St. 234.

[7] Corinne, etc., Co. *v.* Johnston, 5 Utah, 147; 13 Pac. Rep. 17.

[7] Auspach *v.* Ferguson, 71 Ia. 144; 32 N. W. Rep. 249; Friezen *v.* Allemania F. Ins. Co., 30 Fed. Rep. 349; Foote *v.* Massachusetts Ben.

by statute.[1] It is otherwise if the jurisdiction of the subject-matter depends upon whether the property is within the territorial jurisdiction of the court or not, as, in that case, the question would be as to the jurisdiction of the subject-matter, and not of the person; and consent, by an appearance, would not give jurisdiction. But it is held that the right to have a cause affecting title to real estate tried in the county in which the land is situated is a mere privilege that may be waived.[2] And sometimes service of process within the territorial jurisdiction of the court is necessary to give it jurisdiction of the subject-matter. In such case jurisdiction can not be given by an appearance.[3] The objection that the cause has not been transferred to the court in such way as to give it jurisdiction is waived by an appearance.[4] A special appearance is made by making some motion, or filing some pleading, the effect of which is to deny or contest the fact that the party is in court, and contesting its jurisdiction over his person.[5] In making a special appearance, the purpose of such appearance must be stated, and it must be confined and limited to jurisdictional matters.[6]

But under the codes of some of the states the question may be raised by answer, and the effect is the same as if raised by plea or motion.[7] Therefore, if a party pleads to the jurisdiction of the court over his person, but at the

Ass'n, 39 Fed. Rep. 23; Jones *v.* Andrews, 10 Wall. 327; Atkins *v.* Fiber Disintergration Co., 18 Wall. 272; Donnelly *v.* Woolsey, 59 Hun. 618; 13 N. Y. Sup. 433.

[1] Goldstein *v.* City of New Orleans, 38 Fed. Rep. 626.

[2] *Ante*, sec. 22; Walker *v.* Stroud, 6 S. W. Rep. 202; Hazard *v.* Wason, 152 Mass. 268; 25 N. E. Rep. 465.

[3] Wheelock *v.* Lee, 74 N. Y. 495; McCarty *v.* Parker, 14 N. Y. Sup. 128.

[4] Hazard *v.* Wason, 152 Mass. 268; 25 N. E. Rep. 465; Hamrick *v.* Danville, etc., Gravel R. Co., 32 Ind. 347; Cox *v.* Pruitt, 25 Ind. 90.

[5] *Ante*, secs. 13, 22; Green *v.* Green, 42 Kan. 654; 22 Pac. Rep. 730; Kinkade *v.* Meyers, 17 Or. 470; 21 Pac. Rep. 557.

[6] *Ante*, secs. 13, 22; Grantier *v.* Rosecrance, 27 Wis. 488, 491; Kinkade *v.* Meyers, 17 Or. 470; 21 Pac. Rep. 557; Bucklin *v.* Strickler, 48 N. W. Rep. 371.

[7] Harkinson *v.* Page, 31 Fed. Rep. 184.

same time pleads to the merits, which is allowed in some of the systems of practice, his appearance is general, and his objection to the jurisdiction, although expressly made, is waived.[1] But an application for an extension of time to plead until the question of jurisdiction is determined is not a general appearance.[2]

There are cases holding that under a system of practice which allows a pleading contesting the jurisdiction, and one to the merits, to be filed at the same time, the filing of both does not waive the issuance and service of process.[3] But, while the codes permit inconsistent pleadings to be filed, a party can not be heard to deny that he is in court while he is asking the court to exercise its powers and adjudicate a question on the merits in his favor.[4]

And the same rule applies where the party moves to vacate a judgment taken against him by default on non-jurisdictional as well as jurisdictional grounds.[5] It is otherwise when he confines his motion to vacate the judgment to jurisdictional grounds, and appeals on such grounds alone.[6]

It has been held by the Supreme Court of the United States that by pleading to the merits after an ineffectual attempt to set aside an illegal service, does not waive the question.[7] But a distinction is made between an illegal service and an ordinary defect or want of service.[8]

An appeal, or the entry of a notice of appeal, is a submission to the jurisdiction, and waives a want of proper

[1] *Ante*, secs. 13, 22.

[2] Mulhearn *v.* Press Pub. Co., 20 Atl. Rep. 760.

[3] Western & A. R. Co. *v.* Pitts, 79 Ga. 532; 4 S. E. Rep. 921; Allen *v.* Miller, 11 Ohio St. 374.

[4] Cropsey *v.* Wiggenhorn, 3 Neb. 108.

[5] Kaw Valley Life Ass'n *v.* Lemke, 40 Kan. 142; 19 Pac. Rep. 337; Burdette *v.* Corgan, 26 Kan. 104; Grantier *v.* Rosecrance, 27 Wis. 488, 491; Alderson *v.* White, 32 Wis. 308; Crowell *v.* Galloway, 3 Neb. 215.

But see Cobbey *v.* Wright, 23 Neb. 250 (36 N. W. Rep. 505), which is apparently the other way, although the ground upon which the judgment was asked to be set aside does not appear.

[6] Paxton *v.* Daniell, 1 Wash. St. 19; 23 Pac. Rep. 441.

[7] Harkness *v.* Hyde, 98 U. S. 476.

[8] *Ante*, sec. 22; Eddy *v.* Lafayette, 49 Fed. Rep. 809.

service.[1] And it has been held that an appeal from a judgment void for want of service of process, places the appellant in court, on the return of the case, for all the purposes of the trial in the court below.[2] But it is difficult to see upon what theory it can be held that where a party appears specially and objects to the jurisdiction of the court on the ground that he has not been served with process, and appeals on that question alone, the appeal places him in court for any other purpose than to contest that question. If he appeals from a decision against him, and his appeal is sustained, this is a determination that he was not in court, and upon a return of the case he should be in precisely the same position as if the court below had sustained his objection to the jurisdiction.[3]

It is held that a party may preserve his right by a "petition in error" to the appellate court.[4] But in some of the states writs of error are abolished, and the only mode of presenting the question to the appellate court is by appeal, or by some appropriate writ by which the jurisdiction may be questioned. The theory of the cases in which it is held that the appeal is a waiver of the objection is that by appealing the party admits, by the obligation of his appeal bond, that there is a valid judgment against him.[4] But this can not justly be held where the sole basis of the appeal is an erroneous ruling against the party upon his objection to the jurisdiction. Notwithstanding these decisions, the better rule is believed to be that where the appearance below is special, and the only question presented and decided is jurisdictional, and the appeal is on that ground alone, the party is never in court for any

[1] Fee *v.* Big Sand Iron Co., 13 Ohio St. 563; Colorado Cent. Ry. Co. *v.* Caldwell, 11 Colo. 545; 19 Pac. Rep. 542; Dikeman *v.* Mrotek, 76 Wis. 332; 45 N. W. Rep. 118; Dunn *v.* Haines, 17 Neb. 560; 23 N. W. Rep. 501; Waggoner *v.* Fogleman, 53 Ark. 181, 13 S. W. Rep. 729.

[2] Chesapeake, O. & S. W. R. Co. *v.* Heath, 87 Ky. 651; 9 S. W. Rep. 832.

[3] *Amte*, sec. 22; Paxton *v.* Daniell, 1 Wash. St. 19; 23 Pac. Rep. 441; Mills *v.* State, 10 Ind. 114; Briggs *v.* Sneghan, 45 Ind. 14; Todd *v.* De La Mott, 9 Colo. 222; 11 Pac. Rep. 90.

[4] Dunn *v.* Haines, 17 Neb. 560; 23 N. W. Rep. 501.

other purpose than to obtain a decision from the appellate, as well as the trial court, of that question. And that a decision in his favor, by either court, places him out of court for all purposes.

The result of the cases holding to the contrary should be sufficient to support this conclusion. That the party is entitled to a reversal if the ruling against him on the jurisdictional question is conceded, but by the act necessary to obtain a ruling of the appellate court in his favor the effect of such a decision is totally destroyed. By taking the steps necessary to obtain a decision that he is not in court, he is held to place himself in court.[1]

A party can not make an appearance special, by so denominating it, if the act done really amounts to a general appearance.[2]

So if a party enters a special appearance, and contests the jurisdiction of the court, but his objection is overruled and he thereafter pleads to the merits, or does any other act that can only be done by one in court, his objection to the jurisdiction of the court, although erroneously overruled, is thereby waived.[3]

There are cases holding that a party does not waive defects in service by answering to the merits after his objection to the service has been overruled.[4] But the weight of authority is clearly the other way. It is the same where his motion to quash is sustained.[5] But this rule has been

[1] Chesapeake, O. & S. W. R. Co. *v.* Heath, 87 Ky. 651; 9 S. W. Rep. 832; Harkness *v.* Hyde, 98 U. S. 476; Waggoner *v.* Fogleman, 53 Ark. 181; 13 S. W. Rep. 729.

[2] Kaw Valley Life Ass'n *v.* Lemke, 40 Kan. 142; 19 Pac. Rep. 337; Burdette *v.* Corgan, 26 Kan. 104; Grantier *v.* Rosecrance, 27 Wis. 488, 491; Dikeman *v.* Mrotek, 76 Wis. 332; 45 N. W. Rep. 118; Sugg *v.* Thornton, 132 U. S. 524; 10 Sup. Ct. Rep. 163.

[3] *Ante*, sec. 22; Dailey *v.* Kennedy, 64 Mich. 208; 31 N. W. Rep. 125; Union Pac. Ry. Co. *v.* De Busk, 12 Col. 294; 20 Pac. Rep. 752; Walker *v.* Turner, 27 Neb. 103; 42 N. W. Rep. 918; Sugg *v.* Thornton, 132 U. S. 524; 10 Sup. Ct. Rep. 163; Sealy *v.* California Lumber Co., 19 Or. 94; 24 Pac. Rep. 197.

[4] Deidesheimer *v.* Brown, 8 Cal. 340; Ford *v.* Doyle, 44 Id. 635.

[5] Lente *v.* Clarke, 22 Fla. 515; 1 So. Rep. 149.

held not to apply to a case where the service was made in a place where it could not legally be made.[1]

A party does not submit himself to the jurisdiction of the court by setting up, by way of answer, that the service upon him was procured by fraud and contesting the jurisdiction on that ground.[2]

The fact that the process was void, and that the defendant was ignorant of it, at the time, will not change the effect of his appearance to the action.[3]

Submission to the jurisdiction of the court can not give the court jurisdiction over the subject-matter.[4] And, in some of the states, it is provided by statute that a special appearance to contest the jurisdiction of the court, on the ground that there has not been proper service of process, shall constitute an appearance to the action.[5] And such a statute has been held to apply to a non-resident defendant served out of the state.[6] These are most remarkable statutes, but they have been held not to deprive a party of his property without due process of law.[7] But the supreme court of the United States is careful not to hold that a judgment based upon such an appearance, under such a statute, can be enforced. But, if it can not, it is a proceeding without due process of law, whether it is a present taking of property or not.[7]

In the codes of most of the states it is expressly provided what shall constitute an appearance, but they are, as a rule, only declaratory of what the law is without such statutory provisions.

In some cases it has been held that an act that would, under the authorities, amount to a general appearance

[1] *Ante*, sec. 22; Harkness *v.* Hyde, 98 U. S. 476, 479.

[2] Chubbuck *v.* Cleveland, 37 Minn. 466; 35 N. W. Rep. 362.

[3] Pixley *v.* Winchell, 7 Cowen (N. Y.), 366; 17 Am. Dec. 525.

[4] Perkins *v.* Perkins, 7 Conn. 558; 18 Am. Dec. 120.

[5] *Ante*, secs. 13, 33; Church *v.* Crossman, 49 Ia. 444; Rabb *v.* Rogers, 67 Tex. 335; 3 S. W. Rep. 303; Central & M. R. Co. *v.* Morris, 68 Tex. 49; 3 S. W. Rep. 457.

[6] York *v.* State, 73 Tex. 651; 11 S. W. Rep. 869; Sam *v.* Hochstadter, 76 Tex. 162; 13 S. W. Rep. 535.

[7] *Ante*, sec. 33.

was not so because not one of the acts mentioned in the statute providing what would constitute an appearance.[1] But it is believed that an unequivocal act of submission to the jurisdiction of the court would bind a party, although such act is not named in the statute as constituting an appearance, unless the statute contains some negative provision, or in some way indicates an intention to confine the acts constituting an appearance to the ones mentioned. However, where a party is himself asserting a right on the ground that he has appeared to the action, he must show such an appearance as the statute requires.[2]

The effect of an unauthorized appearance by an attorney has been considered in another place.[3] An attorney may be allowed to withdraw his appearance, but this does not change the effect of such appearance as a waiver of service of process by the party.[4] It has been held, however, that a withdrawal of appearance by an attorney withdraws all pleadings filed on behalf of the party he represents, and leaves the case as if no appearance had ever been entered; and that, therefore, service of process must be shown.[5] And that, for that reason, the court may, in its discretion, refuse to allow a withdrawal of appearance where there has been no service of process.[6] The effect of a general appearance is to subject the party to the jurisdiction of the court the same as if he had been regularly served with process issued from a court having the power to obtain jurisdiction by the issuance and service of its process.[7] But where the proceeding is one auxiliary to

[1] Powers *v.* Braly, 75 Cal. 237; 17 Pac. Rep. 197.

[2] McCoy *v.* Bell, 1 Wash. St. 504; 20 Pac. Rep. 595.

[3] *Ante*, sec. 13; but see further on this subject, Phelps *v.* Brewer, 9 Cush. 390; 57 Am. Dec. 56; Williams *v.* Neth, 31 N. W. Rep. 630; Bunton *v.* Lyford, 37 N. H. 512; 75 Am. Dec. 144, 148, note; Mutual Life Ins. Co. *v.* Pinner, 43 N. J. Eq. 52; 10 Atl. Rep. 184; Carroll *v.* Lee, 3 Gill. & John. (Md.) 504; 22 Am. Dec. 350; First Nat'l Bank *v.* Grimes Dry Goods Co., 45 Kan. 510; 26 Pac. Rep. 56.

[4] United States *v.* Yates, 6 How. 605.

[5] Young *v.* Dickey, 63 Ind. 31. [6] Id.

[7] *Ante*, secs. 13, 22; Dailey *v.* Kennedy, 64 Mich. 208; 31 N. W. Rep. 125; Reed *v.* Cates, 11 Colo. 527; 19 Pac. Rep. 464; Atkins *v.* Fiber Dis-

the main action, the purpose of which is to reach property belonging to the defendant, and certain steps are necessary to obtain jurisdiction of the property, it is held, in some of the cases, that an appearance to the main action, by which the court is authorized to render a personal judgment against the defendant, does not give the court jurisdiction of the property or waive the right of the party to contest such jurisdiction.[1] In order to give jurisdiction over the person of a minor, he must be served with process. It can not be given by an appearance by him, or by any one representing him.[2] It is held, however, that a statutory guardian may appear and answer for his ward without service of process.[3] A special appearance to contest the jurisdiction of the court does not give the court jurisdiction.[4]

35. Nature and different kinds of original process.—Original process, in the sense in which we are now to consider it, was, at common law, the means of compelling a defendant to come into court.[5] Under the practice of the present day it may be defined as the means of notifying the defendant of the commencement of an action or proceeding against him or his property, and that if he does not appear, judgment will be taken for the relief demanded. It has been defined as "a form of proceeding taken in a court of justice for the purpose of giving compulsory effect to its jurisdiction."[6]

At common law an action was commenced by the issuance of the original writ out of the court of chancery. The original writ was defined as "a mandatory letter from the king, in parchment, sealed with his great seal, and di-

intergating Co., 18 Wall. 272; Kinkade *v.* Meyers, 17 Or. 470; 21 Pac. Rep. 557.

[1] *Ante*, sec. 14; Noyes *v.* Canada, 30 Fed. Rep. 665.

[2] *Ante*, sec. 13; Carver *v.* Carver, 64 Ind. 194; Helmes *v.* Chadbourne, 45 Wis. 60; Roy *v.* Rowe, 90 Ind. 54. But see on this question, Simmons *v.* Baynard, 30 Fed. Rep. 532.

[3] Curry *v.* Curry, 87 Ky. 667; 9 S. W. Rep. 831.

[4] *Ante*, secs. 13, 22; Branner *v.* Chapman, 11 Kan. 118.

[5] 3 Bl. Com. 279.

[6] Foulke's Ac. in Sup. Ct. 50.

rected to the sheriff of the county wherein the injury is committed or supposed so to be, requiring him to command the wrong-doer, or party accused, either to do justice to complainant, or else to appear in court and answer the accusation against him."[1]

This writ was the foundation of the suit. It was followed by what was called the process which was the means of compelling the defendant to comply with the original writ and appear in court or do justice to the complainant.[2]

The first of these was a notice to the defendant to obey the original writ and called a *summons*. If this was not obeyed, an *attachment* was issued against the defendant's property, followed by the writ of *distringas* which required the sheriff to continue to distrain the defendant by taking his goods and the issues of his lands until he rendered obedience to the original writ.[3]

In actions for forcible injuries various writs against the person of the defendant, not necessary to enumerate, were resorted to.[4]

In equity the first process was a *subpena*, which was a writ "commanding the defendant to appear and answer to the bill on pain of £100." If the defendant did not appear in response to the subpena, he was then in contempt, and the writs of attachment and attachment with proclamation followed. If they failed to produce the defendant in court, a commission of rebellion was awarded against him for not obeying the king's proclamation, four commissioners being named whose duty it was to attach the defendant wherever found in Great Britain. If this failed, a sergeant-at-arms was sent in quest of him, and, if the defendant eluded his search, then sequestration issued to seize all of his personal estate and the issues of his real estate. If the defendant was taken upon any of the process, he was committed to prison until he put in an appearance, or answer, or performed whatever else the

[1] 3 Bl. Com. 273. [2] 3 Bl. Com. 279. [3] 3 Bl. Com. 279, 280.
[4] 3 Bl. Com. 281.

process was issued to enforce and paid the costs which the plaintiff had incurred thereby.[1]

It will thus be seen that the object of process in both common law and equity courts was to *compel* a defendant to appear, or do justice.

The mode of procedure of the two courts differed mainly in this: The common-law courts, in order to enforce obedience to the original writ, proceeded against the *property* of the defendant, while the process of the courts of equity was directed primarily against his person.[2]

In actions for injuries without force the common-law courts could not deprive a defendant of his liberty to compel him to appear. By treating his failure to respond to the subpena a contempt, a court of equity proceeded against his person first, and, if that failed, his property was sequestered and held subject to the order of the court.

Under the civil law, which was followed by the ecclesiastical courts of England, the means of calling a defendant before the court was a personal citation.[3] This process is often called a monition, and is the process adopted and used by the admiralty courts.[4]

Process, under the present practice in this country and in England, is not used to *compel* a party to appear, but to give him the *opportunity* to do so.[5] And while, in a sense, there is a penalty attached to his failure to appear, it is nothing more than that, upon such failure, the relief prayed for by the plaintiff will be granted to him and judgment be rendered against the defendant therefor. Therefore all of the common-law and equity writs and proceedings that were designed to enforce the appearance of a party in court have become obsolete.

In most of the states in this country, and in England, the old common-law and equity writs, as well as those writs adopted by the courts of England from the civil law, have been superseded by the writ of summons. This writ

[1] 3 Bl. Com. 443, 444.
[2] Foulke's Ac. in Sup. Ct. 10.
[3] 3 Bl. Com. 100, 279.
[4] Anderson's Dic. of Law, 684.
[5] *Ante*, sec. 33; Elliott's App. Pro., sec. 170.

has been defined to be "a letter missive from the sovereign, issued at the instance of a plaintiff in a civil action for the purpose of compelling the defendant to appear and answer the claim on pain of judgment being given against him in his absence."[1] But this is not a satisfactory definition. It conveys the idea that a summons, under the present practice, like process at common law, is intended to *compel* a party to appear, when its real purpose is to notify a defendant in order that he may appear and defend if he desires to do so.[2]

In some of the states a summons, so called, is not a writ issuing out of the court, but a mere notice given and signed by the attorneys.[3] Generally, however, it is required to issue out of and under the seal of the court.[4] But, whether it is signed by the attorney of the plaintiff, or issued under the seal of the court, its object and legal effect is the same. It is a notice to the defendant to appear or suffer a default. To summon a party is to notify him that he has been sued, so that he *may* appear in court and answer the complaint.[5] It is one of the means by which a court acquires jurisdiction of the person of a defendant.[6]

In some of the states the writ, or notice, corresponding to the summons in the other states, is denominated a *citation*.[7] In some of the states it is called what it really is, a *notice*.[8]

In those states in which the equity courts and practice are still maintained, and also in equity cases in the federal courts, the writ of subpena is still in use. And it is a little curious to see the old writ of subpena, with its money penalty for non-appearance, still in use in the federal and some other courts in this country, since it has been abolished in the country in which it originated.[9]

[1] Foulke's Ac. in Sup. Ct. 51.
[2] Mezchen *v.* More, 54 Wis. 214; 11 N. W. Rep. 534.
[3] *Post*, sec. 36; Mezchen *v.* More, 54 Wis. 214; 11 N. W. Rep. 534.
[4] *Post*, sec. 36. [5] Anderson's Law Dic. 992.
[6] *Ante*, secs. 13, 22, 23, 32, 33.
[7] Miles *v.* Kinney, 8 S. W. Rep. 542.
[8] Gray *v.* Wolf, 77 Ia. 630; 42 N. W. Rep. 504.
[9] Barton's Suit in Eq. 65.

In some of the states in which the chancery court is still maintained, the writ issued is still called a subpena, but it has been so modified in form as to contain the substance of the ordinary summons.[1]

In many proceedings, especially in probate matters, notice is provided for, not in the form of a summons or other formal writ, but as a simple notice of the time and place of taking some proposed action in a court or other tribunal.

In the federal courts, in admiralty proceedings, the notice of the civil law known as a monition is still in use.[2] But it is in the nature of a summons, although it may, in some cases, be a general citation to all persons, and in others a special citation to individuals named, or a mixed monition containing special directions to all persons, and a special summons to particular persons.[3]

A citation is defined to be "a writ issued out of a court of competent jurisdiction, commanding a person therein named to appear and do something therein mentioned, or to show cause why he should not on a day named."[4] But, like the summons of the present day, it is, as now used, rather a notice than a command to appear, and differs in no material respect from the statutory summons. Indeed, while the original process by which a court acquires jurisdiction is differently named in different states, it is essentially the same in all, and is intended to subserve the same purpose.

In England, where the numerous common-law writs for the enforcement of the attendance of the defendant had their origin, the change has been even more radical than in this country, where courts of equity are still maintained as separate and distinct tribunals in some of the states, and the equity practice is still maintained in the federal courts. In England the old writs were, by successive acts of parliament, materially modified, and the system, as a whole, abolished. And finally, by the judicature acts, all

[1] Barton's Suit in Eq. 66.
[2] Windsor *v.* McVeigh, 93 U. S. 274.
[3] Anderson's Dic. of Law, 684.
[4] Bouv. Law Dic., title Citation.

actions in the superior court, which is a consolidation of the common law, equity, admiralty, and ecclesiastical courts of general jurisdiction, are now commenced by summons.[1]

Provision is now very generally made for the publication of notice of the commencement of an action where the defendant can not be personally served with process, and constructive service is allowed. In some of the states this notice consists of the publication of the summons, in which case it is the same writ but a different mode of serving it. In others, a notice of the pendency of the action is published, containing the same matter in substance as is required to be set out in the summons, citation, or subpena, as the case may be.

In the appellate courts provision is usually made for the giving of notice, or issuance of citation, or other form of writ which constitutes notice to the adverse party, but the statutory provisions for such notices are different in the different states.[2]

36. Requisites of process.—Under the common law system of practice much depended upon the form, as well as the substance, of the writ which was the beginning of the action. Actions were divided into arbitrary classes, and a particular form of writ was necessary for each of these classes. If, therefore, a writ not applicable to an action brought was used, the party making the mistake was turned out of court.[3] But at the present day the form of the writ is regarded as of but little consequence. Its object is to give the defendant such notice of the commencement and object of the action or proceeding that he may have an opportunity to appear and make his defense.[4] Therefore, if a summons or other process, or notice. is is-

[1] *Ante*, sec. 3; Foulke's Ac. in Sup. Ct. 50, 51.

[2] Williams *v.* Hutchinson, 26 Fla. 513; 7 So. Rep. 852 Elliott's App. Pro., secs. 171, 172.

[3] *Ante*, sec. 9.

[4] *Ante*, secs. 32, 33, 34; Bollinger *v.* Manning, 79 Cal. 7; 21 Pac. Rep. 375; Shephard *v.* Brown, 30 W. Va. 13; 3 S. E. Rep. 186.

sued and signed by the proper person, and, if required, under the proper seal, and directed to the proper officer, and notifies the defendant that an action has been, or will be, commenced against him by the plaintiff, the cause of action, in general terms, and the time and place where the defendant may appear, it is usually held sufficient to give the court jurisdiction.[1] It makes no difference by whom the writ is prepared or whether it is filled out before or after the seal and signature of the clerk is attached.[2]

Some cases go so far as to hold that a party is bound to appear and ascertain the nature of the cause of action alleged against him, and that he can not escape the consequences of his failure to do so upon the ground that the summons did not fully inform him of the nature of the cause of action or correctly describe the relief sought.[3] But where the substance and form of notice to be given is provided by statute the notice given must conform, substantially, to the statute.[4] So where a form of summons is prescribed by a rule of court.[5]

If the notice is such that, notwithstanding its defects, it can be understood, and the defects are such as can not mislead the party, it will be upheld.[6]

A summons, or other notice, may be defective or irregular, and therefore subject to be quashed or set aside on motion, and yet be sufficient to give the court jurisdiction.[7]

[1] Elliott's App. Pro., secs. 170–172; Patmor *v.* Rombauer, 41 Kan. 295; 21 Pac. Rep. 284; Jewett *v.* Garrett, 47 Fed. Rep. 625.

[2] Potter *v.* John Hutchinson M'f'g Co., 87 Mich. 59; 49 N. W. Rep. 517; Jewett *v.* Garrett, 47 Fed. Rep. 625.

[3] Freeman *v.* Paul, 105 Ind. 451; 5 N. E. Rep. 754.

[4] Allen *v.* Strickland, 100 N. C. 225; 6 S. E. Rep. 780; Simmons *v.* Cochran, 29 S. C. 31; 6 S. E. Rep. 859; Atchison T. & S. F. R. Co. *v.* Nicholls, 8 Colo. 188; 6 Pac. Rep. 512; Lyman *v.* Milton, 44 Cal. 630; Durham *v.* Betterton, 79 Tex. 223; 14 S. W. Rep. 1060; People *v.* Greene, 52 Cal. 577; Streeter *v.* Frank, 3 Pin. (Wis.) 386; Dyas *v.* Keaton, 3 Mont. 495; Higley *v.* Pollock, 27 Pac. Rep. 895.

[5] Chamberlain *v.* Bittersohn, 48 Fed. Rep. 42.

[6] McAllep *v.* The Latona, 3 Wash. Ter. 332; 19 Pac. Rep. 131; Burroughs *v.* Norton, 48 How. Pr. 132; Boyd *v.* Weil, 11 Wis. 58; Higley *v.* Pollock, 27 Pac. Rep. 895.

[7] *Ante*, secs. 13, 22, 23; *post*, sec. 40; Quarl *v.* Abbott, 102 Ind. 233; 1 N. E.

But it must be sufficiently certain to inform the party of the matter he is called upon to answer.[1]

Where the action is for a money judgment the amount claimed must be set out in the summons.[2]

In many of the states summons is not made returnable on any specified return day, but the defendant is given by law a certain number of days after service of the writ to answer. Under such a statute, while it may be an irregularity to fix a different time for answer in the writ it does not render it invalid or affect a judgment rendered upon it.[3]

The name of the person to be summoned must be inserted in the writ.[4] But a variance in the name will not vitiate the service in all cases if service of the writ is actually made on the proper person.[5] In such case the party has notice, although irregular, and may object to its sufficiency on the ground of variance in the name, but if he does not the judgment rendered is not void for want of jurisdiction.[6]

The writ must be directed to some officer or person authorized by law to execute it or it is void.[7]

If the statute directs the issuance of a writ to one officer, only in case some other officer is disqualified, from interest or some other cause, the disqualification must exist or the writ can not be directed to such officer and he be conditionally authorized to execute it.[8]

Rep. 476; McAllop *v.* Latona, 3 Wash. Ter. 332; 19 Pac. Rep. 131; Bank of Missouri *v.* Matson, 26 Mo. 243; 72 Am. Dec. 208.

[1] Weiser *v.* Day, 77 Ia. 25; 41 N. W. Rep. 476; Gundry *v.* Whittlesey, 19 Wis. 211.

[2] Gundry *v.* Whittlesey, 19 Wis. 211.

[3] Porter *v.* Vandercook, 11 Wis. 70.

[4] Keller *v.* Stanley, 86 Ky. 240; 5 S. W. Rep. 477; Lyman *v.* Milton, 44 Cal. 630; Tex. & Pac. Ry. Co. *v.* Florence, 14 S. W. Rep. 1070; Southern Pacific Co. *v.* Block, 19 S. W. Rep. 300.

[5] Johnson *v.* Patterson, 59 Ind. 237. But see Southern Pacific Co. *v.* Block, 19 S. W. Rep. 300.

[6] Morgan *v.* Woods, 33 Ind. 23; Hollingsworth *v.* Barbour, 4 Pet. 466, 476.

[7] Vaughn *v.* Brown, 9 Ark. 20; 47 Am. Dec. 730.

[8] Gowdy *v.* Sanders, 88 Ky. 346; 11 S. W. Rep. 82.

In some of the states the form of the summons depends upon the nature of the action, it being provided, generally, that where the action is on contract for a money judgment, the summons must notify the defendant that if he fails to appear the plaintiff will take judgment for the sum claimed by him, and in other cases, that unless the defendant appears and answers, the plaintiff will apply to the court for the relief demanded. These useless provisions have given rise to some very perplexing questions. In many cases the summons and complaint do not agree as to the cause of action. In such case, if the summons is served before the complaint is filed, and the complaint subsequently filed contains a different cause of action, and one that would require a summons in a different form, it is usually held that the summons is invalid for the reason that by the incorrect statement in the summons the party may have been misled into allowing a judgment to be taken by default.[1]

But if the summons and complaint are served together, the complaint controls as to the cause of action, and the defendant has full notice of the claim made against him, and notwithstanding the variance between the complaint and the summons, the summons is held to be valid.[2] In other words, if it appears that the defendant could not have been misled or injured by the discrepancy, the summons will be held sufficient even as against a direct motion to set it aside.[3]

But it has been held that unless the defendant has done something to waive the defect, it will be conclusively presumed that he was injured by the failure to comply with

[1] Brown *v.* Eaton, 37 How. Pr. 325; St. Paul Harvester Co. *v.* Forbreg, 50 N. W. Rep. 628.

[2] Brown *v.* Eaton, 37 How. Pr. 325; City of Fond du Lac *v.* Bonesteel, 22 Wis. 251; Berry *v.* Bingaman, 47 N. W. Rep. 825; Higley *v.* Pollock, 27 Pac. Rep. 895; St. Paul Harvester Co. *v.* Forbreg, 50 N. W. Rep. 628; Chamberlain *v.* Bittersohn, 48 Fed. Rep. 42.

[3] McCoun *v.* N. Y. C. & H. R. R. Co., 50 N. Y. 176; Clark *v.* Palmer, 90 Cal. 504; Clark *v.* Gunn, 27 Pac. Rep. 375; Berry *v.* Bingaman, 47 N. W. Rep. 825; Sweeney *v.* Schultz, 19 Nev. 53; 6 Pac. Rep. 44; Higley *v.* Pollock, 27 Pac. Rep. 895.

the statute.[1] And there are cases holding that under such circumstances the statute fixing the form of the summons is mandatory, and a failure to comply with it renders the summons fatally defective.[2] It will be noticed, however, that in some, at least of these cases, a copy of the complaint was not required by law to be served with the summons, and if the summons did not conform to the complaint on file, the defect was such as to mislead the defendant. In some of the cases a summons of the kind under consideration is held to be voidable, and subject to be set aside on motion, or on appeal, but not void.[3] And in others, that in case of a variance of this kind the fault is in the complaint, which should follow the summons, if the latter is filed first, and that the attack should be upon the complaint on the ground that it does not conform to the summons.[4]

In some of the decisions a distinction is made between cases in which application must be made to the court for relief, and those in which the clerk may enter the default, as to the effect of a mistake of this kind. It is said that if the action is one in which the clerk may enter a default, the defendant can not be injured by a statement in the summons that application will be made to the court for relief, but that, if the action is one in which the defendant is entitled to have the matter submitted to the court, a notice to him that in case he fails to answer judgment will be taken against him for the amount claimed, is one affecting a substantial right, viz., the right to have the court pass upon the question as to the relief to be granted

[1] Dyas *v.* Keaton, 3 Mont. 495; Sweeney *v.* Schultz, 19 Nev. 53; 6 Pac. Rep. 44; St. Paul Harvester Co. *v.* Forbreg, 50 N. W. Rep. 628.

[2] Atchison, T. & S. F. R. Co. *v.* Nicholls, 8 Colo. 188; 6 Pac. Rep. 512; Smith *v.* Aurich, 6 Colo. 388; Sawyer *v.* Robertson, 11 Mont. 416; 28 Pac. Rep. 456; Porter *v.* Hermann, 8 Cal. 619, 625; Dyas *v.* Keaton, 3 Mont. 495; Chamberlain *v.* Bittersohn, 48 Fed. Rep. 42; Chamberlain *v.* Mensing, 47 Fed. Rep. 202.

[3] Keybers *v.* McComber, 67 Cal. 395; 7 Pac. Rep. 838; Ward *v.* Ward, 59 Cal. 139.

[4] City of Fond du Lac *v.* Bonesteel, 22 Wis. 251.

to the plaintiff.[1] But the force of the reasoning upon which this distinction is attempted to be maintained is not apparent. The cause of action set out in the complaint, or in the summons if no complaint is required to be served, must disclose to the defendant whether judgment can be taken against him upon default entered by the clerk, or whether application must be made to the court for relief. The defendant has notice of every fact necessary for him to determine whether to answer or not. If the case is one in which relief must be demanded of the court he must know, as a matter of law, that judgment can not be taken against him, as of course, upon the entry of default by the clerk, although the summons so states. And as the object of a summons, as we have seen, is to notify the defendant of the facts necessary to inform him of the cause of action and the time and place for his appearance, whether the means by which the relief demanded is to be obtained is correctly stated in the summons or not does not affect any substantial right of the defendant. Therefore the only ground upon which a mistake in this respect, in the summons, can be held to render it void, is that it does not comply with the requirements of the statute. But the weight of authority is that a failure to comply with the statute, where it appears that no substantial right of the defendant is affected thereby, does not render the summons void, but only irregular, and subject to be set aside on direct attack.[2] And a literal compliance with the statute is not required even on a direct attack.[3]

Notice in the summons that judgment will be taken for the amount claimed will not authorize the clerk to enter judgment by default, where the action is not one arising on contract for the recovery of money or damages

[1] Schuttler *v.* King, 30 Pac. Rep. 25.

[2] Dyas *v.* Keaton, 3 Mont. 495, 499; Schuttler *v.* King, 30 Pac. Rep. 25; McCoun *v.* N. Y. Cent., etc., R. Co., 50 N. Y. 176; Clark *v.* Palmer, 90 Cal. 504; Clark *v.* Gunn, 27 Pac. Rep. 375; Berry *v.* Bingaman, 47 N. W. Rep. 825; Sweeney *v.* Schultz, 19 Nev. 53; 6 Pac. Rep. 44.

[3] Behlow *v.* Shorb, 91 Cal. 141; 27 Pac. Rep. 546; Kimball *v.* Castagim, 8 Colo. 525; 9 Pac. Rep. 488.

only.[1] A general statement of the cause of action in the summons is sufficient.[2] The clerk of one court can not issue process returnable to another court unless expressly authorized to do so by law, and a summons so issued is void, although the same person is clerk of both courts.[3] The signature of the person or officer required to issue the writ is necessary to its validity.[4] In some of the states summons is authorized to be signed by the plaintiff or his attorney. Under such statutes it is held that the summons need not be tested in the name of the presiding judge of the court, or the clerk, nor have the seal of the court affixed.[5] The fact that the signature of the clerk, or of an attorney, to the summons, is printed, instead of being written, does not render the summons void.[6] Undoubtedly, the use of a printed signature is liable to abuse, as a writ may be used in such form by a third party without the knowledge of the clerk. But the presumption is in favor of its validity, and if put out without the consent of the officer whose duty it is to issue it, and whose name appears to it, the burden of showing that it was issued without his authority is upon the party attacking the writ.[7] Usually, where writs of summons, or other original writs, are required to be issued by the clerk of a court, they must be tested in the name of the clerk, or of the judge of the court, as may be provided, and bear the seal

[1] People *v.* Weil, 53 Cal. 253.

[2] Bewick *v.* Muir, 83 Cal. 368; 23 Pac. Rep. 389.

[3] Lowrey *v.* Richmond & D. R. Co., 83 Ga. 504; 10 S. E. Rep. 123.

[4] Lowrey *v.* Richmond & D. R. Co., 83 Ga. 504; 10 S. E. Rep. 123; Brown *v.* Way, 33 Ga. 190.

[5] *Ante*, sec. 32; Johnson *v.* Hamberger, 13 Wis. 175.

[6] Herrick *v.* Morrill, 37 Minn. 250; 33 N. W. Rep. 849; Ligare *v.* California S. R. R. Co., 76 Cal. 610; 18 Pac. Rep. 777; Mezchen *v.* More, 54 Wis. 214; 11 N. W. Rep. 534. It was held otherwise in Ames *v.* Schurmeier, 9 Minn. 221, but that case is expressly overruled by Herrick *v.* Morrill, *supra*.

[7] In Ligare *v.* California S. R. R. Co., *supra*, it was held that the affixing of the seal by the clerk to a form of summons with his name printed thereto, was a sufficient adoption of the printed signature as his own.

of the court.[1] But it is held that the teste of a writ is a matter of form, and may be amended.[2] And that it may be amended by attaching the seal even after judgment.[3] It follows from this that a summons perfect in all other respects, but lacking the seal, is defective, but not void.[4] But the authorities on this subject are not uniform. And while it is believed that the rule that a summons, without a seal, is not void, but may be amended, is the better and

[1] Den *v.* Bank of Cape Fear, 3 Dev. Law 279; 22 Am. Dec. 722; Garland *v.* Britton, 12 Ill. 232; 52 Am. Dec. 487; Woolford *v.* Dugan, 2 Ark. 131; 35 Am. Dec. 52.

[2] Guarantee Trust, etc., Co. *v.* Buddington, 23 Fla. 514; 2 Sou. Rep. 885; State *v.* Davis, 73 Ind. 359; Woolford *v.* Dugan, 35 Am. Dec. 53, note; United States *v.* Turner, 50 Fed. Rep. 734.

[3] State *v.* Davis, 73 Ind. 359; Boyd *v.* Fitch, 71 Ind. 306; Krug *v.* Davis, 85 Ind. 310; Jump *v.* Batton, 35 Mo. 193; 86 Am. Dec. 146; Jackson *v.* Brown, 4 Cow. 550.

[4] "The liberal provisions of our statute, respecting the summons, would take such writs from under the old common law rule, even if it were conceded that it is the rule which must be adopted respecting other writs. The provisions of the code upon this subject are contained in article 4, and the provision which directly bears upon this point is found in section 37, and is as follows: 'No summons, or the service, shall be set aside, or be adjudged insufficient, where there is sufficient substance about either to inform the party on whom it may be served, that there is an action instituted against him in court.' We think it very clear that the omission to affix the seal does not prevent the writ from imparting to the parties against whom it is issued, and that very fully and distinctly, information that an action is instituted against them. The seal would afford no information; its office is merely to attest the authenticity of the writ. The absence of the seal does not take from the substance of the writ any thing essential to the information which our code provides that it shall give the parties against whom it issues. There is certainly sufficient substance about a summons, which is defective only in the single particular that a seal is lacking, to impart full information that an action has been instituted against the parties therein designated as defendants. A summons which is sufficient in substance to do this, is valid under our statute. This was so held in Boyd *v.* Fitch, 71 Ind. 306, and we are well satisfied that the ruling was entirely correct. We hold that, under our code, a summons is not void because not attested by the seal of the court, and that the court has the right to order the clerk to affix the seal now for then. Miller *v.* Royce, 60 Ind. 189; Newhouse *v.* Martin, 68 Ind. 224." State *v.* Davis, 73 Ind. 360.

more reasonable one, it must be admitted that there are numerous authorities to the contrary.[1]

It is usually provided that writs of summons shall run in the name of the state, but even where this is required by the constitution a failure to comply with the requirement does not render the writ void, but irregular only.[2] The issuance of a summons is a ministerial act, and therefore

[1] Frosch *v.* Schlumpf, 2 Tex. 442; 47 Am. Dec. 655; Stayton *v.* Newcomer, 1 Eng. (Ark.) 451; 44 Am. Dec. 524.

"According to the principal case, the sealing of a writ is indispensable to its validity; and the absence of the seal authorizes the person against whom the writ is directed, to treat it as a nullity. This extreme view is not without abundant support in the decisions of other tribunals. Den *v.* Bank of Cape Fear, 22 Am. Dec. 722; Tackett *v.* State, 24 Id. 582. Generally, an execution or other writ may be amended for the purpose of effectuating proceedings taken under it. Doe *v.* Rue, 29 Id. 368; Ross *v.* Luther, 15 Id. 341; Hargrave *v.* Penrod, 12 Id. 201; Scribner *v.* Whitcher, 23 Id. 708. In discussing this question on a former occasion, we said: 'The effect of the failure to affix the seal of the court to an execution is a subject upon which the authorities are too evenly divided to warrant us in expressing a very decided opinion. The question has been much more frequently determined than discussed by the courts. The conclusions on either side have been announced with a curtness and dogmatism that disdained argument and explanation, and cared neither to deal with logic nor to delve for precedents. On the one side, the theory seems to be that before the seal is affixed there can be no writ; that without the seal there can be no legal command to execute the judgment of the court; that an officer acting in the absence of a seal acts in the absence of a writ; and that, while so acting, whatever he does is unjustifiable and void. Insurance Co *v.* Hallock, 6 Wall. 556; Boal *v.* King, 6 Ohio, 11; Swett *v.* Patrick, 2 Fairf. 11; Hutchins *v.* Edson, 1 N. H. 139; Shackleford *v.* McRea, 2 Hawks, 226; Seawell *v.* Bank of Cape Fear, 3 Dev. 279. On the other side, it is assumed that the omission of the seal is an omission of a matter of form rather than of substance; that it can be corrected by amendment, on application to the court; and that, being an amendable error, it can not utterly avoid the writ.' Dever *v.* Akin, 40 Ga. 429; Corwith *v.* Bank of Illinois, 18 Wis. 560; Sabin *v.* Austin, 19 Id. 421; People *v.* Dunning, 1 Wend. 16; Dominick *v.* Eacker, 3 Barb. 17; Arnold *v.* Nye, 23 Mich. 286; Sawyer *v.* Baker, 3 Greenl. 29; Purcell *v.* McFarland, 1 Ired. 34, Bridewell *v.* Mooney, 25 Ark. 524; Clark *v.* Hellen, 1 Ired. 421." Woolford *v.* Dugan, 35 Am. Dec. 53, note.

[2] Jump *v.* Batton. 35 Mo. 193; 86 Am. Dec. 146; Ilsley *v.* Harris, 10 Wis. 95. But see Roach *v.* Moulton, 2 Pin. (Wis.) 221.

a clerk may issue a summons in an action in his own behalf.[1] But it may be otherwise in case of the execution of a writ by a sheriff. At common law, where the sheriff was a party, all writs issued in the action were required to be directed to the coroner. And provision to the same effect is usually made by statute. It has been held, therefore, that a writ issued to a sheriff in a case in which he is interested is void.[2] But this was in case of an execution. And such a defect in a summons, while it might be sufficient to set it aside in case of a direct attack, should not render it void. As the sole object of a summons or citation is to notify the defendant of the action against him, the mere fact that it is directed to the wrong officer would not affect it in the least as such notice. But we shall see when we come to consider the question of service of process that in legislation authorizing the service of process by others than an officer it is usually provided that the person so authorized shall not be interested in the action.[3] And it is usually held that a writ issued to one officer can not be served by another officer, or person, unless expressly authorized by law.[3] But a writ served by the proper officer when directed to another may be amended after service by correcting the direction.[4] Therefore it can not be safely said that a summons directed to an officer who is interested in the result of the action is not void, but only irregular, although, according to the liberal rules laid down by the later authorities as to the sufficiency of process, intended to give notice only, it should be so held.[5]

A notice must be one authorized by law, or it is no notice, no matter how accurate it may be.[6]

[1] Evans *v.* Etheridge, 96 N. C. 42; 1 S. E. Rep. 633.

[2] Collins *v.* McLeod, 8 Ire. L. (N. Car.) 221; 49 Am. Dec. 376.

[3] *Post*, sec. 37.

[4] Pecott *v.* Oliver, 10 Pac. Rep. 302; Lyon *v.* Fish, 20 Ohio, 100, 105; Walden *v.* Davidson, 15 Wend. 574; Hearsey *v.* Bradbury, 9 Mass. 95; Campbell *v.* Stiles, 9 Mass. 217; Hibben *v.* Smith, 50 Cal. 511; Chadwick *v.* Divol, 12 Vt. 499; *post*, sec. 37.

[5] See on this subject Adams *v.* Wiscasset Bank, 1 Greenleaf (Me.) 361; 10 Am. Dec. 88.

[6] *Ante*, sec. 33; Allen *v.* Strickland, 100 N. C. 225; 6 S. E. Rep. 780;

A summons issued on Sunday will be upheld where the exigencies of the case require immediate action in order to secure the rights of plaintiff.[1]

As to the time when a summons may issue the statutes of the several states differ. Where the writ is required to be issued by the clerk or court it is generally provided that it shall issue after the complaint is filed. And if it is issued before it is void.[2] But in some of the states the summons or citation is authorized to be issued before the complaint is filed, in which case it must, instead of stating that an action has been brought, set forth the time when it will be commenced. Where summons or other notice is authorized to be issued in advance of the commencement of the action, it is sometimes allowed to be issued and signed by the plaintiff or his attorney instead of the clerk or judge. But there is no reason why the same thing may not be authorized to be done by the clerk.

An *alias* summons may issue after the original summons has become *functus officio*, as by having been returned, the return day having passed, or the like. So where the original summons is out of the reach or control of the officer whose duty it is to serve it, it has been held that an *alias* writ may issue.[3]

By the return day of a summons, or other original writ, is meant, not only the day upon which the writ shall be returned into court by the officer, but the time when the defendant shall appear and answer the complaint.[4]

In some cases, the time when a summons is made returnable affects its validity. Thus it is held that a summons issued before, and made returnable after the next ensuing term of the court, is void.[5] So it is held that

Stuart *v.* Palmer, 74 N. Y. 183, 188; Kuntz *v.* Sumption, 117 Ind. 1; 19 N. E. Rep. 474.

[1] Pearson *v.* Alsalfa, 44 Fed. Rep. 358.

[2] Mills *v.* State, 10 Ind. 114.

[3] Williams *v.* Welton, 28 Ohio St. 451, 469.

[4] Anderson's Law Dic. 898; 3 Bl. Com. 273.

[5] Elliott's App. Pro., sec. 333; Briggs *v.* Sneghan, 45 Ind. 14; Culver *v.* Phelps, 130 Ill. 217; 22 N. E. Rep. 809.

where the statute requires the time for the appearance of a defendant in a court of inferior jurisdiction to be fixed in the summons, not more than a certain number of days from its issuance, a summons made returnable more than the time provided, from its date, is void.[1] But making a summons returnable in less than the stated time does not render it void.[2]

Generally, the first day in the term is made the return day,[3] but any time during the term may be made so by statute, or the plaintiff may be authorized to fix any day in the term for the return of the summons, by indorsement on the complaint.[4]

If the statute fixes the return day, a summons made returnable on any other day gives the court no jurisdiction.[5]

A writ made returnable on a legal holiday is not void, but the return day will be the first day thereafter when the court may legally transact business.[6]

If a statute requires summons to be made returnable at a fixed hour, a summons which fails to fix the hour is defective, and may be set aside on motion, or upon review, writ of error, or appeal.[7] Not only so, but such a summons would seem to be so uncertain as not to give the court jurisdiction. But it has been held otherwise in case of a domestic judgment.[7]

In some of the states it is required by statute that the name of the attorney for the plaintiff be indorsed on the summons. But it has been held that a failure to comply with this requirement does not render the summons void, but only irregular.[8] But in the case cited the names of the attorneys did appear on the face of the summons, and

[1] Simmons *v.* Cochran, 29 S. C. 31; 6 S. E. Rep. 859; Pantall *v.* Dickey, 123 Pa. St. 431; 16 Atl. Rep. 789.

[2] Clough *v.* McDonald, 18 Kan. 114; Swerdsfeger *v.* The State, 21 Kan. 475; In re Newman, 75 Cal. 213; 16 Pac. Rep. 887. But see Bell *v.* Good, 19 N. Y. Sup. 693.

[3] Briggs *v.* Sneghan, 45 Ind. 14. [4] Johnson *v.* Lynch, 87 Ind. 326.

[5] Crowell *v.* Galloway, 3 Neb. 215, 218.

[6] Ostertag *v.* Galbraith, 23 Neb. 730; 37 N. W. Rep. 637.

[7] Hendrick *v.* Whittemore, 105 Mass. 23.

[8] Shinn *v.* Cummins, 65 Cal. 97; 3 Pac. Rep. 133.

the opinion of the court rests, mainly, upon the fact that the failure to indorse the name of the attorney thereon did not affect the substantial rights of the defendant where the name appeared elsewhere on the writ. But if the name of the attorney is omitted entirely, the summons is still sufficient to give the party notice of all that is necessary for him to know, except it may be the person upon whom to serve his answer, which must appear from the complaint, and the summons, under the later and more liberal rules, would still not be void.[1]

A summons which, standing alone, would be void for uncertainty, misnomer of the parties to the action, or the like, may be aided and rendered valid by the complaint, or declaration, if properly annexed thereto.[2]

37. SERVICE OF PROCESS.—The time and manner of service of process is governed, almost entirely, by statutes in the several states. These statutory provisions differ in matters not material, but in respect of substantial requisites, affecting the rights of defendants, they will be found to be very similar. The purpose and object of all of the statutes is to give a party ample time and opportunity to appear and make his defense.[3]

The statutes regulating the issuance and service of original process are so nearly alike in all essential respects, differing mainly as to matters of form, and the way in which the same thing shall be done, that we might reasonably expect to find a like uniformity and concurrence in the decisions of the courts respecting them. But an examination of the cases speedily dispels this idea. The decisions are numerous and irreconcilably conflicting on many, if not most, of the questions arising under this important branch of the law.

Service of process may be considered under four distinct heads, viz., by whom, when, where, and how service must be made. And as incidental to these, the last particularly, the person upon whom service is to be made becomes ma-

[1] Jewett *v.* Garrett, 47 Fed. Rep. 625; *post*, sec. 37.
[2] Scudder *v.* Massengill, 14 S. E. Rep. 571.
[3] *Ante*, sec. 36.

terial. Whether the party served is a resident or non-resident, a married woman, a minor, an insane person, or one acting in an official capacity, or a corporation, frequently affects the validity or sufficiency of the service. All of these, except the question of service on corporations, will receive attention in this section. The subject of service on corporations will be taken up in a subsequent section.

The general rule is that the jurisdiction of a court "can never be called into exercise unless through the medium of process complete in law and *duly served.*"[1]

1. *By whom service must be made.*—As a general rule, certain officers are authorized to serve process, such process must be directed to them, and they alone can make legal service.[2] At common law no person but a public officer can serve process.[3] Service of process by one not authorized to serve it is a nullity, and confers no jurisdiction.[4]

Usually the sheriff is authorized to serve process issuing out of the state courts of superior original jurisdiction, constables process issuing out of the inferior courts, and the marshal process issuing out of the federal courts.[5]

But sometimes service may legally be made by either of two or more officers, as may be provided by law, and the service of either will be valid.[6] This, however, is a matter subject to statutory regulation and control, and in many of the states private individuals are authorized, under certain conditions and restrictions, to serve original process.[7]

So officers who are required to make service are sometimes authorized to appoint special deputies or bailiffs to serve a particular writ, or serve process within a limited

[1] Peck *v.* Strauss, 33 Cal. 680; Allyn *v.* Davis, 10 Vt. 547; Bank of Burlington *v.* Catlin, 11 Vt. 106; Dolbear *v.* Town of Hancock, 19 Vt. 389.

[2] Falvey *v.* Jones, 80 Ga. 130; 4 S. E. Rep. 264; Kyle *v.* Kyle, 55 Ind. 387.

[3] Peck *v.* Strauss, 33 Cal. 680.

[4] Kyle *v.* Kyle, 55 Ind. 387.

[5] Barton's Suit in Eq. 68.

[6] Parker *v.* Dacres, 1 Wash. St. 190; 24 Pac. Rep. 192.

[7] Johnson *v.* MacCoy, 32 W. Va. 552; 9 S. E. Rep. 887.

territory.[1] And, without statutory anthority, an officer may appoint a special bailiff to do a particular act.[2] An infant may be appointed a special bailiff to do a particular act, but not as a general deputy.[3]

The appointment of a general deputy vests him with authority to do every act that might be done by the principal, except to appoint a deputy, and any agreement or understanding between the principal and deputy, limiting the extent of his authority, is void as to the public.[4] And, while a deputy can not appoint a deputy, he may appoint another to do a particular act, and therefore may authorize a private person to serve a particular writ.[5] But where the appointment is special, the authority of the deputy is limited by such appointment. Therefore, where an appointment is made by an officer having authority to serve process throughout the limits of the state, of a deputy, or special bailiff, to serve all process within a certain county, a service by such deputy in another county is invalid.[5]

So a special bailiff appointed to serve a particular writ, can not legally go beyond the authority thus given him, and if he does, his acts are invalid. But where one appointed as a special bailiff is competent to make service as a private individual, his service may be good under the statute, although insufficient under his special appointment. In such case, however, the proof of service must be different. It can not be by the return of the party serving the writ, in the name of his principal, but must be by his affidavit showing his competency to serve the writ as a private individual, and that as such he duly served

[1] Guarantee Trust, etc., Co. *v.* Buddington, 23 Fla. 514; 2 Sou. Rep. 885.

[2] New Albany, etc., R. R. Co. *v.* Grooms, 9 Ind. 243; Proctor *v.* Walker, 12 Ind. 660.

[3] New Albany, etc., R. R. Co. *v.* Grooms, 9 Ind. 243.

[4] Willingham *v.* State, 21 Fla. 776, 778; Guarantee Trust, etc., Co. *v.* Buddington, 23 Fla. 514; 2 Sou. Rep. 885, 889.

[5] Guarantee Trust, etc., Co. *v.* Buddington, 23 Fla. 514; 2 Sou. Rep. 885, 889.

the same.[1] An appointment of a special bailiff, without a seal, where the law requires such appointment to be made under seal, renders the bailiff a *de facto* officer, and the service of a writ under such appointment is valid.[2] It has been held that where the statute required the appointment to be indorsed on the writ, a service under a verbal appointment was defective, but whether such service was void or not was not decided.[3] It is believed, however, that under the more liberal rule which prevails at the present day, such a service, which affords full notice to the defendant, should be upheld as against a collateral attack. Technical objections of this kind to the service of process have but little to recommend them.

At common law a constable has the authority, in case of sickness or necessary absence, to appoint a deputy to perform his duties during his inability to act, but not to appoint a permanent deputy.[4] And in the absence of any statute on the subject, the common law rule as to the extent to which he may delegate his powers applies.[5] Therefore, it is held that in the absence of any statute on the subject, the service of process by one acting under a regular appointment as a permanent deputy gives the court no jurisdiction.[4] A sheriff can not, in his official capacity, serve process out of his county, nor can a private individual, appointed by the court in one county, serve process in another.[6] A direction of the writ to a wrong officer does not always render the service of it invalid. If, for example, a writ is directed to the wrong officer, but is served by the proper one, the writ may be amended, and the service is valid.[7] But where one officer is authorized to serve pro-

[1] *Post*, sec. 39; Higgins *v.* Beckwith, 14 S. W. Rep. 931.

[2] Jewell *v.* Gilbert, 64 N. H. 13; 5 Atl. Rep. 80.

[3] Barry *v.* Hovey, 30 Ohio St. 344.

[4] Prickett *v.* Cleek, 11 Pac. Rep. 49.

[5] Jobson *v.* Fennell, 35 Cal. 711; Prickett *v.* Cleek, 11 Pac. Rep. 49.

[6] Lillard *v.* Brannin, 16 S. W. Rep. 349; Dolbear *v.* Town of Hancock, 19 Vt. 389.

[7] Pecotte *v.* Oliver, 10 Pac. Rep. 302; Lyon *v.* Fish, 20 Ohio, 100, 105; Walden *v.* Davison, 15 Wend. 574; Hearsey *v.* Bradbury, 9 Mass. 95;

cess only where some other officer is disqualified, the presumption is that such officer is qualified, and the contrary must be affirmatively shown where service is made by the officer so conditionally authorized, or the service will be held invalid.[1] And the same rule applies where the court is authorized to appoint one to serve process where the officer authorized by law to serve the same is disqualified.[2] Where private individuals acting independently of any officer, or acting under special appointment, are authorized to serve process, service by them is as effective, if properly made, as service by an officer.[3] At common law, where the sheriff was disqualified to serve process in a given case, the duty devolved upon the coroner.[4] In this country, provision is usually made, in case of the disqualification of the officer who is required by law to act, for some other designated officer to make service. And if no officer is competent to make service, provision is usually made for the appointment of some suitable person to act, by the court before whom the action is pending. In order to render a service, made by one not the officer authorized by law to act, valid, it must appear that such officer was disqualified to make the service, or that such person is authorized by law to serve such process.[2] The general doctrine is that an officer can not serve process in his own case.[5] But there are cases holding that the rule does not apply to the service of a summons, which is a mere notice.[6] And this seems to accord with the doctrine that a summons is intended merely to notify the party, and give him an opportunity to be heard.[7] Notice given by service of a writ by an interested party is as much notice, and as effectual for the purpose for which it is required to be issued and served, as if served by one

Campbell *v.* Stiles, 9 Mass. 217; Hibbert *v.* Smith, 50 Cal. 511; Chadwick *v.* Divol, 12 Vt. 499.

[1] Gowdy *v.* Sanders, 88 Ky. 346; 11 S. W. Rep. 82.

[2] Bruner *v.* Superior Court, 92 Cal. 239; 28 Pac. Rep. 341.

[3] Peck *v.* Strauss, 33 Cal. 678.

[4] *Ante*, sec. 36.

[5] *Ante*, sec. 36; Collais *v.* McLeod, 8 Ire. Law (N. Car.) 221; 49 Am. Dec. 376.

[6] Putnam *v.* Man, 3 Wend. 202; 20 Am. Dec. 686.

[7] *Ante*, sec. 36.

entirely disinterested. The only objection that can be made to the allowance of such service is the temptation it affords to the making of insufficient service and false returns. Where private individuals are authorized by statute to serve process it is generally required that such person shall not be a party to the suit or interested in the result of the action.[1] So a party to the suit can not serve his own writ.[2]

Where it is provided that only persons not interested in the action shall be appointed to serve process, a service by an interested party, although regularly appointed in all other respects, is void and confers no jurisdiction on the court.[3]

If a court is authorized, on certain conditions, to appoint a private individual to serve process, an appointment where such conditions do not exist confers no authority to serve the writ.[4] But where the requisite qualifications or the necessity for the appointment are not required to be set out in the appointment, they need not appear affirmatively, but will be presumed.[5] It is otherwise if the appointment or direction of the writ giving a special authorization to serve it, is required to state the reason for such appointment or direction of the writ.[6] And where the appointment or special authorization is required to set forth the reason therefor it is held that it can not be amended, after service, so as to render such service valid.[6]

Where private individuals of prescribed qualifications are authorized to serve process, it must appear that they

[1] Gadsby *v.* Stimer, 79 Mich. 260; 44 N. W. Rep. 606; Union Mut. Fire Ins. Co. *v.* Page, 61 Mich. 72; 27 N. W. Rep. 859.

[2] Hemmer *v.* Wolfer, 11 N. E. Rep. 885.

[3] Union Mut. Fire Ins. Co. *v.* Page, 61 Mich. 72; 27 N. W. Rep. 859.

[4] Gadsby *v.* Stimer, 79 Mich. 260; 44 N. W. Rep. 606; Union Mut. Fire Ins. Co. *v.* Page, 61 Mich. 72; 27 N. W. Rep. 859; Bruner *v.* Superior Court, 92 Cal. 239; 28 Pac. Rep. 341.

[5] Morse *v.* Carpenter, 31 Neb. 224; 47 N. W. Rep. 853.

[6] Dolbear *v.* Town of Hancock, 19 Vt. 389.

have the necessary qualifications or the service can not be upheld.[1]

Where a sheriff is empowered to authorize another person to serve a summons, by indorsement thereon, such indorsement on an original summons gives no authority to serve an *alias* summons after the original has been returned.[2]

2. *When may be served.*—As a general rule a summons can not, legally, be served before the filing of the complaint. But in some of the states notice in the nature of a summons that a suit will be brought in the future is authorized.[3] And such a notice may properly be served before the complaint is filed. Independently of such or similar statutory provisions, the service of a summons before the suit is commenced confers no jurisdiction.

A summons becomes *functus officio* after the return day thereof, and its service thereafter is invalid.[4] The remedy of the plaintiff in such a case is to procure an *alias* summons.[5]

The service of process, regular in form, will not confer jurisdiction where such process was not authorized; for example, where the clerk had issued one citation and was not authorized to issue another without an order of court.[6] But it has been held that a summons may be dated, issued, and executed on the return day.[7] It is held, however, in some cases, that a service of summons on the return day is voidable, but not void.[8]

3. *Where may be served.*—The general rule is that the process of a court can not extend beyond the territorial jurisdiction of the court, and that, unless expressly au-

[1] Barney *v.* Vigoreaux, 75 Cal. 376; 17 Pac. Rep. 433.

[2] Thompson *v.* Moore, 15 S. W. Rep. 6. [3] *Ante*, secs. 35, 36.

[4] Weems *v.* Raiford, 8 Sou. Rep. 260; Harrington *v.* Harrington, 16 S. W. Rep. 538; Peck *v.* La Roche, 12 S. E. Rep. 638.

[5] *Ante*, sec. 36; Weems *v.* Raiford, 8 Sou. Rep. 360.

[6] Peck *v.* La Roche, 12 S. E. Rep. 638.

[7] Spragins *v.* West Virginia C. & P. Ry. Co., 35 W. Va. 139; 13 S. E. Rep. 45.

[8] Meisse *v.* McCoy, 17 Ohio St. 225.

thorized by law, its process can not be served outside of the territory over which it has jurisdiction.[1] But the authority to serve process out of the territorial jurisdiction of the court may be given by statute.[2] And it is usually provided that the process of state courts, having jurisdiction over counties, or other territory of less extent, shall run throughout the state and may be served anywhere therein.[3] So, in some of the states, service of process, personally, outside of the state is authorized.[4] But when so served it is usually treated, not as personal, but as constructive service.[5]

It is not necessary that the party served shall reside within the state, or other territorial jurisdiction, in order to render personal service therein effective. A party may be served if he is voluntarily within the jurisdiction of the court temporarily.[6] But there are exceptions to this rule. A party can not be served with process when he is a non-resident and is temporarily within the state or county in attendance on a court, either as a party or a witness, or while going to and returning therefrom.[7] A party must be allowed a reasonable time to return to his own state after the necessity of his attendance at court ceases,

[1] *Ante*, secs. 13, 15; United States *v.* Crawford, 47 Fed. Rep. 561; Noyes *v.* Canada, 30 Fed. Rep. 665; Masterson *v.* Little, 75 Tex. 682; 13 S. W. Rep. 154.

[2] United States *v.* Crawford, 47 Fed. Rep. 561.

[3] *Ante*, sec. 15; Crawford *v.* Wilcox, 68 Tex. 109; 3 S. W. Rep. 695.

[4] *Ante*, sec. 13.

[5] *Ante*, sec. 13; Williams *v.* Welton, 28 Ohio St. 451, 467; Brooklyn Trust Co. *v.* Bulmer, 49 N. Y. 84; Denny *v.* Ashley, 12 Colo. 165; 20 Pac. Rep. 331; Cudabac *v.* Strong, 67 Miss. 705; 7 Sou. Rep. 543; Bausman Tilley, 46 Minn. 66; 48 N. W. Rep. 459.

[6] *Ante*, sec. 13; Rape *v.* Heaton, 9 Wis. 328, 343; 76 Am. Dec. 269; Peabody *v.* Hamilton, 106 Mass. 220; Thompson *v.* Cowell, 148 Mass. 552; 20 N. E. Rep. 170; Jewett *v.* Garrett, 47 Fed. Rep. 625.

[7] Shaver *v.* Letherby, 41 N. W. Rep. 677; Jacobson *v.* Hosmer, 76 Mich. 234; 42 N. W. Rep. 1110; First Nat'l Bank *v.* Ames, 39 Minn. 179; 39 N. W. Rep. 308; Andrews *v.* Lembeck, 46 Ohio St. 38; 18 N. E. Rep. 483; Moletor *v.* Sinnen, 76 Wis. 308; 44 N. W. Rep. 1099; Mitchell *v.* Wixon, 53 Mich. 541; 19 N. W. Rep. 176; Matthews *v.* Tufts, 87 N. Y. 568; Kauffman *v.* Kennedy, 25 Fed. Rep. 785; Larned *v.* Griffin, 12 Fed. Rep. 590; Ex parte Healey, 53 Vt. 694; 38 Am. Rep. 713.

and no longer.[1] There are cases holding that the privilege only protects a party from the service of process involving arrest,[2] and that it does not extend to parties attending on the trial of civil cases.[3] But the decided weight of authority is the other way on both of these propositions.

The privilege is not confined to persons actually attending court, but extends to one attending before a referee or other person authorized to take testimony in a pending action,[4] and to creditors attending proceedings in bankruptcy;[5] but not to one attending the taking of a deposition to be used in another state.[6]

The immunity does not depend upon statutory provisions, but is upheld as necessary for the due administration of justice.[7] The right does not depend upon citizenship, but upon residence.[8] The rule is not confined to non-residents of a state. It applies with equal force, and with like reason, to a resident of the state attending court out of his county.[9]

A distinction has sometimes been made between resident and non-resident suitors and witnesses, in case of arrest, it being held in case of residents that they can only be discharged from arrest by filing common bail, while

[1] Moletor *v.* Sinnen, 76 Wis. 308; 44 N. W. Rep. 1099; Finch *v.* Galligher, 12 N. Y. Sup. 487; Bolgiano *v.* Gilbert Lock Co., 73 Md. 132; 20 Atl. Rep. 788; Marks *v.* La Societe, etc., 19 N. Y. Sup. 470.

[2] Case *v.* Rorabacher, 15 Mich. 537; Christian *v.* Williams, 20 S. W. Rep. 96; Ellis *v.* De Garmo, 24 Atl. Rep. 579.

[3] Baldwin *v.* Emerson, 16 R. I. 304; 15 Atl. Rep. 83.

[4] Bridges *v.* Sheldon, 7 Fed. Rep. 17, 42; Hollender *v.* Hall, 18 N. Y. C. P. 394; 13 N. Y. Sup. 758.

[5] Matthews *v.* Tufts, 87 N. Y. 568.

[6] Parker *v.* Marco, 61 Hun, 519; 16 N. Y. Sup. 325.

[7] Matthews *v.* Tufts, 87 N. Y. 570.

[8] Hollender *v.* Hall, 18 N. Y. C. P. 394; 13 N. Y. Sup. 758; Thorp *v.* Adams, 58 Hun, 603; 11 N. Y. Sup. 479; Hollander *v.* Hall, 58 Hun, 604; 11 N. Y. Sup. 521.

[9] Shaver *v.* Letherby, 41 N. W. Rep. 677; Mitchell *v.* Wixon, 53 Mich. 541; 19 N. W. Rep. 176; Jacobson *v.* Hosmer, 76 Mich. 234; 42 N. W. Rep. 1110; Andrews *v.* Lembeck, 46 Ohio St. 38; 18 N. E. Rep. 483.

service on a non-resident will be set aside absolutely.[1] But it is believed that no reason exists for any such distinction.[2] In other cases it is held, with better reason, that service upon a resident in attendance at court out of his county is not a nullity, but the court will control the service, and either set it aside, change the venue, or otherwise remedy any special disadvantage entailed upon the defendant by such service.[3] And in some of the states, provision for changing the venue in such cases is made. But, as we have said, the great weight of authority is to the effect that the same rule and the same remedy must apply to residents and non-residents, in the absence of any statute on the subject. It makes no difference that the attendance of the party as a witness is voluntary and without service of process.[4]

In some of the cases a distinction has been made between residents and non-residents of the state as to the privilege from service of civil process when attending court.[5] But this is a distinction that is not generally recognized in the decided cases, as has been shown above. So it is held in some of the decided cases, against the great weight ef authority, that the privilege does not extend to a non-resident in attendance on a court as a party, although he may be a witness also.[6]

The exception also extends to one who has been induced to come within the jurisdiction of the court by fraud, or deception, for the purpose of procuring the service.[7] It has been held in one case that a deception of this kind will not affect the jurisdiction of the court where it ap-

[1] See Person *v.* Grier, 66 N. Y. 124; Hopkins *v.* Coburn, 1 Wend. 292; Flechter *v.* Franko, 21 N. Y. C. P. 34; 15 N. Y. Sup. 674.

[2] Larned *v.* Griffin, 12 Fed. Rep. 590; Sanford *v.* Chase, 3 Cow. 381.

[3] Massey *v.* Colville, 45 N. J. Law, 119; 46 Am. Rep. 754.

[4] Larned *v.* Griffin, 12 Fed. Rep. 590; Bolgiano *v.* Gilbert Lock Co., 73 Md. 132; 20 Atl. Rep. 788.

[5] Flechter *v.* Franko, 21 N. Y. C. P. 34; 15 N. Y. Sup. 674.

[6] Capwell *v.* Sipe, 23 Atl. Rep. 14.

[7] *Ante*, sec. 22, p. 117; Van Horne *v.* Great Western Mfg. Co., 37 Kan. 523; 15 Pac. Rep. 562; Chubbuck *v.* Cleveland, 37 Min. 466; 35 N. W. Rep. 362; Dunham *v.* Cressy, 4 N. Y. Sup. 13.

pears that no injury could have resulted to the party.[1] But, fortunately, a court does not usually stop to consider the consequences when the use of its process has been obtained by fraud. Service on one as an officer of a corporation, such corporation being a party, is within the rule.[2]

A member of congress is privileged from the service of civil process as well as from arrest while in attendance at a session of congress, and while going to and returning therefrom.[3] And a slight deviation from the direct route, either going or coming, does not affect the right.[3] But the privilege only extends to a reasonable time for going and coming.[4] The same rule applies to members of the legislature.[5] In some of the cases the privilege is confined to process involving arrest.[6] But the principles affecting witnesses and parties in attendance at court are equally applicable to cases of this kind, and the privilege should be the same.

The question of privilege is usually raised by motion to quash the writ, set aside the service, or dismiss the action. But the question may be raised by plea in abatement.[7] And in some of the cases the service of process, under such circumstances, is treated as a contempt of the court, and the plaintiff compelled to discontinue his action or be committed.[8]

Where service of one defendant, out of the county, is authorized where his co-defendant is a resident of the county in which the action is brought, the resident defendant must have a real and substantial interest in the subject of the action, adverse to the plaintiff, or the service

[1] Commercial Nat'l Bank *v.* Davidson, 18 Or. 57; 22 Pac. Rep. 517.

[2] *Post*, sec. 43; Shehan *v.* Bardford B. & K. R. Co., 3 N. Y. Sup. 790; Mulhearn *v.* Press Pub. Co., 53 N. J. Law, 153; 21 Atl. Rep. 186.

[3] Miner *v.* Markham, 28 Fed. Rep. 387, 390.

[4] Hopkin *v.* Jenckes, 8 R. I. 453; 5 Am. Rep. 597, 601.

[5] Miner *v.* Markham, 28 Fed. Rep. 387, 390; Doty *v.* Strong, 1 Pinney (Wis.), 84.

[6] Gentry *v.* Griffith, 27 Tex. 461.

[7] Larned *v.* Griffin, 12 Fed. Rep. 590.

[8] In re Healey, 53 Vt. 694; 38 Am. Rep. 713.

will be set aside.[1] For a defective service of process, the remedy is by a direct attack upon it in the trial court. If a default has been taken, the question can be raised by a motion to set aside the default.[2] The question can not be raised for the first time in the appellate court.[2] But this rule applies only to defective, and not to void service. If the service is void, and no act waiving service or submitting the person to the jurisdiction of the court has been done, the jurisdiction of the court may be attacked at any time directly or collaterally.[3] But it must be borne in mind that an appeal from a judgment is generally held to be a waiver of want of service of process.[4]

4. *How may be served.*—Generally, the writ is required to be served, personally, upon the defendant. Handing the writ to a third party, and the immediate delivery thereof, by him, to the defendant, in the presence of the officer, is a sufficient personal service.[5] But there must be an actual delivery of it to the party to be served, in the presence of the officer.[6] In some of the states, provision is made for leaving a copy of the writ at the place of residence of the defendant. Usually these statutes require that the writ shall not only be left at the place of residence of the defendant, but that it be delivered, there, to some member of the household of proper age and discretion. A delivery of the writ to a third party is not always required, however. Where delivery to a third party is required, leaving a copy of the summons with the husband for the wife, is a valid service on her.[7] A strict compliance with statutory provisions of this nature is required by the courts.[8]

[1] Dunn *v.* Haines, 17 Neb. 560; 23 N. W. Rep. 501. Allen *v.* Miller, 11 Ohio St. 374.

[2] De Armond *v.* Adams, 25 Ind. 455.

[3] *Ante*, secs. 22, 23.

[4] *Ante*, secs. 22, p. 110.

[5] Palmer *v.* Belcher, 21 Neb. 58; 31 N. W. Rep. 262.

[6] Holliday *v.* Brown, 50 N. W. Rep. 1042.

[7] McLane *v.* Piaggio, 24 Fla. 71; 3 Sou. Rep. 823, 827.

[8] Settlemier *v.* Sullivan, 97 U. S. 444; Jenkins *v.* Crofton, 9 S. W. Rep. 406; Swift *v.* Meyers, 37 Fed. Rep. 37; Laney *v.* Garbee, 105 Mo. 355; 16 S. W. Rep. 831.

If service by leaving a copy is only authorized where the defendant can not be found, the proof of service must show that he can not be found or the leaving of a copy as provided for is not a valid service.[1]

Where a copy must be left with one person, if living, and if not with another, service upon the latter, while the former is living, is invalid.[2]

In most of the states a copy of the declaration, complaint, or petition, is required to be served with the writ on at least one of the defendants, and where so required the service of such copy is necessary to give the court jurisdiction.[3] And where the law so provides the officer must deliver such copy whether he is commanded to do so by the writ or not.[4] So if a certified copy is required to be served the service of a copy not certified is insufficient.[5]

It is held, in some of the cases, that where partners are sued in their individual names and a member of the firm is absent from the state, service on the other partner is sufficient to bind the absent defendant at least as to the parnership property. And this, too, where the defendants had ceased to be partners at the time the suit was brought.[6] But it is difficult to see upon what principle such a doctrine can be maintained. It is certainly a rule that is calculated to work great injury and one subject to great abuse. Such a doctrine is opposed to the well settled rule of law that a party must be served with process and be given an opportunity to be heard before judgment can be taken against him.[7]

In some of the states special provision is made for the service of process where the defendants are sued as partners, as, for example, by leaving a copy at their place of business. Under such a statute service on an agent of

[1] Settlemier *v.* Sullivan, 97 U. S. 444; *post*, sec. 39.
[2] Jenkins *v.* Crofton, 9 S. W. Rep. 406.
[3] Southern Pac. R. R. Co. *v.* Superior Court, 59 Cal. 471.
[4] Crawford *v.* Wilcox, 68 Tex. 109; 3 S. W. Rep. 695.
[5] Lauderdale *v.* R. & T. A., etc., Co., 80 Tex. 496; 16 S. W. Rep. 308.
[6] Winters *v.* Means, 25 Neb. 241; 41 N. W. Rep. 157.
[7] *Ante*, secs. 32, 33.

the firm, at some other place than that designated in the statute, is insufficient, although service on the agent, at the proper place, is allowed.[1] But such a statute has been held not to apply where partners are sued in their individual names.[2]

Where service of a writ, by copy, is required or authorized, a variance between the original and the copy is usually held to be an irregularity of which advantage must be taken by motion, before judgment, and does not affect the jurisdiction of the court.[3]

Certainly this is the correct doctrine where it does not appear that the defendant was injured by the mistake. And the question whether he was so injured or not could only be determined, properly, upon a direct attack made by him upon the service. But the failure to serve a copy renders the service void.[4]

Special provisions for service of process on persons laboring under legal disabilities or acting in official capacities are frequently made by statute. And when made they must be followed. It may be well, in this connection, to consider, briefly, these special modes of service.

a. Service on minors.—The most common provision for service on minors is that the writ shall be served, and its contents be made known, to some member of the family of such minor of proper age and discretion.[5]

A literal compliance with such a statute is not always sufficient. Thus it is held that where the plaintiff in the action is a member of the family of a minor defendant and in all other respects a competent person upon whom to serve the writ, a service upon him is insufficient, because of his adverse interest.[6]

Such a service has been held sufficient where the writ

[1] Mitchell & Rammelsburg Fur. Co. *v.* Simpson, 40 Fed. Rep. 805.

[2] Herron *v.* Cole, 25 Neb. 692; 41 N. W. Rep. 765.

[3] Low *v.* Kalamazoo Circuit Judge, 61 Mich. 35; 27 N. W. Rep. 877.

[4] Wilkinson *v.* Chilson, 71 Wis. 131; 36 N. W. Rep. 836.

[5] Hemmer *v.* Wolfer, 11 N. E. Rep. 885.

[6] Hemmer *v.* Wolfer, 11 N. E. Rep. 885; Hemmer *v.* Wolfer, 124 Ill. 435; 16 N. E. Rep. 652.

was required to be served on the father of the minor and no other mode of service was provided.[1] But the law which compelled such a decision was subsequently changed.[2] Where a copy is required to be left with the father, if living, and if not with the mother, etc., naming others upon whom service may be made, in their order, a service upon any one of the latter, when one of the former is living, is not a valid service.[3]

An insufficient service on a minor is not cured by the appointment of a guardian *ad litem*.[4]

b. Service on insane persons.—If an insane person has a guardian, provision is usually made for service upon such guardian. If not upon any person having such person in custody. Some of the statutes provide for a commission upon whom service may be made. And where such person has no guardian, a guardian *ad litem* is appointed to represent him and look after his interests. There is nothing peculiar about service upon an insane person that calls for special consideration in this connection.

c. Service on married women.—As a rule, under the codes, a married woman must be served in the same manner that service is made on other persons.[5]

Where the action is not to affect the wife's separate property, but her inchoate interest in real estate owned by her husband, service on the husband alone has been held to be sufficient in an action to foreclose a mortgage.[6] But this is not the generally accepted rule at the present day. The rule is that if a wife has such an interest as that an action against her is proper, she is entitled to notice the same as any other person. The common law rule was, in this, as well as in many other respects, that the husband and wife were one, and that service on the husband was, for that reason, service on both, even where the wife was

[1] Donaldson *v.* Stone, 11 S. W. Rep. 462.
[2] Tyler *v.* Jewell, 11 S. W. Rep. 25.
[3] Jenkins *v.* Crofton, 9 S. W. Rep. 406.
[4] Hogle *v*, Hogle, 2 N. Y. Sup. 172; Pinckney *v.* Smith, 26 Hun, 624.
[5] Holliday *v.* Brown, 50 N. W. Rep. 1042.
[6] Feitner *v.* Lewis, 119 N. Y. 131; 23 N. E. Rep. 296.

an infant or insane.[1] And where the common law disabilities of the wife are still maintained, the doctrine that such a service is binding upon her no doubt still exists, unless abrogated or changed by statute. But in many of the states the disabilities of married women have been entirely removed, and in others very materially modified.

d. Service on persons acting in an official capacity.—What is said in this connection will not include the question of service on corporations through their officers and agents. That subject will be taken up in another section.[2]

In the absence of some statute requiring a different mode, service upon one acting in an official capacity, and sued as such officer, does not differ from the mode of service required in actions against private individuals. But special provision is sometimes made for service upon public officers, and when such provision is made of course the statute must be followed.

38. CONSTRUCTIVE SERVICE OF PROCESS.—The term constructive notice is usually understood to mean some such notice as may, or may not, come to the actual knowledge of a party as distinguished from actual personal notice,[3] as, for example, publication of a notice in a newspaper or posting the same. But the term has been made to include actual or personal notice, so far as the legal effect of service is concerned, in some cases, as, for example, in case of personal service out of the state in which the court has jurisdiction.[4] This mode of giving notice is exceptional, and the requirements of statutes authorizing it must be complied with in every material respect.[5] The question as to the sufficiency of constructive notice to confer jurisdiction is separated, necessarily, into several divisions, amongst others, the following, which will be considered in this connection: *a.* In what cases constructive notice is allowed. *b.* The affidavit. *c.* The officer's return as a basis for publication. *d.* The order for publication. *e.* The

[1] Feitner *v.* Lewis, 119 N. Y. 131; 23 N. E. Rep. 296. [2] *Post*, sec. 43.
[3] Anderson's Dic. of Law, 714. [4] *Ante*, secs. 13, 14, 32, 33.
[5] *Ante*, sec. 32, 1 Black on Judg., sec. 232.

publication. *f.* Proof of publication. *g.* Personal service out of the state.

a. In what cases constructive notice is allowed.—As has been said elsewhere, the question as to the kind of notice that shall be given in any class of cases, in actions against its own citizens, is under the control of the state, and so long as the constitutional provision against the taking of property without due process of law is not violated, constructive notice may undoubtedly be substituted for actual notice.[1] But if such power exists in the states, there seems to be no disposition to exercise it. Therefore, the general rule on the subject is, that a purely personal action can not be maintained upon constructive notice, and a personal judgment rendered thereon even against one residing within the state.[2] So in case of a judgment against a non-resident.[3]

[1] *Ante*, secs. 32, 33.

[2] *Ante*, secs. 13, 32, 33; Quarl *v.* Abbett, 102 Ind. 233; 52 Am. Rep. 662; Pennoyer *v.* Neff, 95 U. S. 714; Bardwell *v.* Anderson, 44 Minn. 97; 46 N. W. Rep. 315; Williams *v.* Welton, 28 Ohio St. 451, 467; 1 Black on Judg., sec. 220; Winfree *v.* Bagley, 102 N. C. 515; 9 S. E. Rep. 198.

[3] *Ante*, secs. 13, 32, 33; Eliot *v.* McCormick, 144 Mass. 10; 10 N. E. Rep. 705; Dearing *v.* Bank of Charleston, 5 Ga. 497; 48 Am. Dec. 300; Mohr *v.* Manierre, 101 U. S. 417; Winfree *v.* Bagley, 102 N. C. 515; 9 S. E. Rep. 198; Farmers, etc., Bank *v.* Bank of Allen Co., 88 Tenn. 279; 12 S. W. Rep. 545; Beckett *v.* State, 30 N. E. Rep. 536.

"The framers of the constitution, in establishing the federal judiciary, assumed that it would be governed in the administration of justice by those settled principles then in force in the several states, and prevailing in the jurisprudence of the country from which our institutions were principally derived. Among them none were more important than those determining the manner in which the jurisdiction of the courts could be acquired. This necessarily depended upon the nature of the subject upon which the judicial power was called to act. If it was invoked against the person, to enforce a liability, the personal citation of the defendant or his voluntary appearance was required. If it was called into exercise with reference to real property by proceedings *in rem.*, or of that nature, a different mode of procedure was usually necessary, such as a seizure of the property, with notice, by publication or otherwise, to parties having interests which might be affected. The rules governing this matter in these and other cases were a part of the general law of the land, established in our jurisprudence for the protection of rights of persons and property against oppression and spolia-

A personal judgment is one which binds the judgment defendant personally and creates a lien upon his property generally.[1] Therefore, the right to proceed upon constructive process is allowed in cases *in rem.*,[2] or cases in which personal actions are prosecuted and property within the jurisdiction of the court is sought to be reached by attachment or other like process, in which case a personal judgment can not be rendered, but the relief must be confined to an application of the property to the satisfaction of the plaintiff's claim.[3] And the fact that one of the

tion. And when the courts of the United States were invested with jurisdiction over controversies between citizens of different states, it was expected that these rules should be applied for the security and protection of the non-resident citizen. The constitutional provision owed its existence to the impression that state prejudices and attachments might sometimes affect injuriously the regular administration of justice in the state courts. And the law of congress which was passed to give effect to the provision, made it optional with the non-resident citizen to require a suit against him, when commenced in a state court, to be transferred to a federal court. This power of removal would be of little value, and the constitutional provision would be practically defeated, if the ordinary rules established by the general law for acquiring jurisdiction in such cases could be thwarted by state legislation or the decision of the local courts. In some instances, the states have provided for personal judgments against non-residents without personal citation, upon a mere constructive service of process by publication; but the federal courts have not hesitated to hold such judgments invalid. Pennoyer *v.* Neff, 96 U. S. 744. So, on the other hand, if the local courts should hold that certain conditions must be performed before jurisdiction is obtained, and thus defeat rights of non-resident citizens acquired when a different ruling prevailed, the federal courts would be delinquent in duty if they followed the later decision." Mohr *v.* Manierre, 101 U. S. 421.

[1] Quarl *v.* Abbett, 102 Ind. 233; 52 Am. Rep. 662.

[2] Pennoyer *v.* Neff, 95 U. S. 714, 723; Boswell *v.* Otis, 9 How. 336; Lydiard *v.* Chute, 45 Minn. 277; 47 N. W. Rep. 967.

[3] *Ante*, secs. 14, 23, 25, 32; Freeman on Judg., sec. 607a; Quarl *v.* Abbett, 102 Ind. 233; 52 Am. Rep. 662; Pennoyer *v.* Neff, 95 U. S. 714, 723; Cooper *v.* Reynolds, 10 Wal. 308; Williams *v.* Welton, 28 Ohio St. 451, 467; 1 Black on Judg., sec. 229, 231; Winfree *v.* Bagley, 102 N. C. 515: 9 S. W. Rep. 198; Lydiard *v.* Chute, 45 Minn. 277; 47 N. W. Rep. 967.

In Quarl *v.* Abbett, 102 Ind. 237, 52 Am. Rep. 662, the court said: "It is a general principle that the process of the courts may reach and seize property within their jurisdiction. A man who brings property within the territorial jurisdiction of a state subjects it to the laws of

defendants, liable on the same written instrument, has property within the state, gives no right to proceed by publication against the other defendant who has not.[1]

that state. 'If a foreigner or citizen of another state,' says an able court, 'send his property within a jurisdiction different from that where he resides, he impliedly submits it to the rules and regulations in force in the country where he places it. What the law protects, it has the right to regulate.' Clark *v.* Tarbell, 58 N. H. 88. This general doctrine has been declared by other courts, among them our own. Ames Iron Works *v.* Warren, 76 Ind. 512; Green *v.* Van Buskirk, 7 Wall. 139; Rice *v.* Courtis, 32 Vt. 460. It is upon this general principle that our statutory provisions relative to notice by publication are founded. If property of a non-resident can not be reached by legal process upon constructive notice, then our statutes were passed in vain and are mere empty legislative declarations, without either force or meaning; for, if the person is not within the jurisdiction of the court, no personal judgment can be rendered, and if the judgment can not operate upon the property, then no effective judgment at all can be rendered, so that the result would be that the court would be powerless to assist a citizen against a non-resident. Such a result would be a deplorable one. If the rule were that which appellant's argument asserts, a citizen with a chattel mortgage could not enforce it on property within our borders against a non-resident, nor could a creditor enforce a claim against a man who had fled to Canada and made it his residence, although he had abundance of property within the state. Nor, if the rule were as asserted, could property of non-resident corporations within our limits be reached. But the rule is not as contended for; property within our jurisdiction may be seized upon process issued upon constructive notice. This has been often decided with respect to attachment proceedings. Judge Story says: 'Sometimes the seizure or attachment is purely nominal, as, for example, of a chip, or a cane, or a hat. In other cases the seizure or attachment is *bona fide* of real property or personal property within the territory, or of debts due to the non-resident persons in the hands of their debtors who live within the country. In such cases, for all the purposes of the suit, the existence of the property so seized or attached within the territory constitutes a just ground of proceeding to enforce the rights of the plaintiff to the extent of subjecting such property to execution upon the decree or judgment.' Story Conf. Laws, sec. 549. Wharton says: 'But when the thing is situate within the jurisdiction of the court, then proceedings *in rem.* give a title to it against all the world.' Wharton Conf. Law, sec. 829. He applies this doctrine to the seizure of goods under a writ of attachment, and cites Ewer *v.* Coffin, 1 Cush. 23; Phelps *v.* Holker, 1 Dall. 261; Pawling *v.* Bird, 13 Johns. 192; Arndt *v.* Arndt, 15 Ohio, 33; McVicker *v.* Beedy, 31 Maine, 314; Bissell *v.* Briggs, 9 Mass. 462."

[1] Farmers, etc., Bank *v.* Bank of Allen Co., 88 Tenn. 279; 12 S. W. Rep. 545.

But it must be remembered that, as a general rule, in this class of cases, depending upon the existence of property within the jurisdiction of the court, it is the seizure of the property that gives jurisdiction over it, and not constructive notice to the owners alone. Both seizure of the property and notice are necessary.[1]

Publication is also allowed where the action is to enforce some instrument giving a specific lien upon property within the jurisdiction of the court, as in case of a mortgage either upon real or personal property.[2] Or where the proceeding is one affecting the title to real estate and is authorized to be brought where the land is situated.[3] Actions to set aside fraudulent conveyances of real estate are held to belong to this class.[4] And actions to quiet the title to real estate.[5] And to abate a nuisance, consisting of real estate or the use of it.[6] And to establish a trust in real estate.[7] And a bill to remove a cloud from the title to real estate.[8] But in all of these cases, where the jurisdiction of the court, whether legal or equitable, depends upon the presence of property within the territorial jurisdiction, the powers of the court are confined to the property, and a personal judgment can not be rendered on constructive notice.[9] So, constructive service may be had in cases affecting the *status* of the parties to the action, as in cases of divorce, in which cases, and others of a kindred nature, a personal judgment, as, for example, for alimony, can not be rendered.[10]

[1] *Ante*, sec. 14; Cooper *v.* Reynolds, 10 Wal. 308.

[2] Crombie *v.* Little, 47 Minn. 581; 50 N. W. Rep. 823.

[3] Boswell *v.* Otis, 9 How. 336; Adams *v.* Cowles, 95 Mo. 501; 8 S. W. Rep. 711.

[4] Adams *v.* Cowles, 95 Mo. 501; 8 S. W. Rep. 711; Chicago, etc., Bridge Co. *v.* Anglo-American Packing, etc., Co., 46 Fed. Rep. 584; McLaughlin *v.* McCrory, 55 Ark. 442; 18 S. W. Rep. 762.

[5] Dillon *v.* Heller, 39 Kan. 599; 18 Pac. Rep. 693.

[6] Radford *v.* Thornell, 81 Ia. 709; 45 N. W. Rep. 890.

[7] Porter Land and Water Co. *v.* Baskin, 43 Fed. Rep. 323; Chicago, etc., Bridge Co. *v.* Anglo-American Packing, etc., Co., 46 Fed. Rep. 584.

[8] Morris *v.* Graham, 51 Fed. Rep. 53. [9] Boswell *v.* Otis, 9 How. 336.

[10] *Ante*, sec. 13; Blackinton *v.* Blackinton, 141 Mass. 432; 5 N. E. Rep. 830; In re Newman, 75 Cal. 213; 16 Pac. Rep. 887.

Independent of statutory authority, courts of equity, as well as common law courts, are without power to direct service upon defendants beyond their territorial jurisdiction.[1] Courts of equity have assumed the power to order service to be made within their jurisdiction upon some person for the absent defendant.[2] But this power has been confined to bills other than original bills and other proceedings which are continuations of a suit in which the court has already obtained jurisdiction.[3] Besides, the statute of the United States now provides in what cases constructive service may be had upon non-residents and the manner of making such service, and this statute must be held to limit and define the powers of the federal courts in this respect.[4]

b. The affidavit.—In order to entitle a party to resort to constructive notice as a means of bringing a defendant, or his property, within the jurisdiction of the court, he must show by affidavit that the cause is one in which constructive service is allowed. And this must be done by showing that the defendant is a non-resident or can not after due diligence be found within the state, and that some one or more of the statutory grounds for making publication exists.[5] Or must show some ground upon which, under the statute, a resident defendant may be proceeded against by publication.[6]

The making of the affidavit is a jurisdictional step in the case, and a substantial compliance with the statute is necessary to give the court jurisdiction.[7] But an affi-

[1] Batt *v.* Procter, 45 Fed. Rep. 515, 516.

[2] Foster's Fed. Prac., p. 155, sec. 96.

[3] Foster's Fed. Prac., p. 155, sec. 96; Pacific R. Co. *v.* Mo. Pac. Ry. Co., 3 Fed. Rep. 772.

[4] Pacific R. Co., *v.* Mo. Pac. Ry. Co., 3 Fed. Rep. 772; Batt *v.* Procter, 45 Fed. Rep. 515; Foster's Fed. Prac., p. 157, sec. 97.

[5] Ligare *v.* California S. R. R. Co., 76 Cal. 610; 18 Pac. Rep. 777; Bryan *v.* University Pub. Co., 112 N. Y. 382; 19 N. E. Rep. 825; Landrue *v.* Lund, 38 Minn. 538; 38 N. W. Rep. 699; Forbes *v.* Hyde, 31 Cal. 342, 353; Slocum *v.* Slocum, 17 Wis. 150; Batt *v.* Procter, 45 Fed. Rep. 515.

[6] Frisk *v.* Reigelman, 75 Wis. 499; 44 N. W. Rep. 766.

[7] Atkins *v.* Atkins, 9 Neb. 200; 2 N. W. Rep. 466; Shields *v.* Miller, 9 Kan. 390; Chase *v.* Kaynor, 78 Ia. 449; 43 N. W. Rep. 269.

davit may be sufficient to give the court jurisdiction and yet be held insufficient to withstand a direct attack. If there is an entire want of a necessary allegation in the affidavit a judgment rendered thereunder will be void. If the allegation is not omitted, but is imperfectly made, the judgment will not be void, but merely voidable.[1]

It is not always required that the affidavit shall state all the facts necessary to render a judgment, when recovered, effectual. For example, in order to render a judgment effectual in a personal action, the defendant must have property within the state. But unless the statute requires it the affidavit need not show the fact.[2]

It must be remembered, however, that such a judgment is void, as a personal judgment, and unless property of the defendant is attached in the action, or otherwise brought under subjection to the judgment when rendered, the same is of no effect.[3] And while such a showing is not necessary in some of the states it is so in others, simply because the statute makes it so. Therefore when it is said that an affidavit showing that the case is one in which publication may be made is necessary, it must be taken with the qualification that the statute authorizing publication may require less or require no showing at all by affidavit. It is a matter of statutory regulation entirely. But the effect of allowing judgment to be taken without such showing, or where the fact authorizing publication does not exist, is quite another thing. The only test as to what the affidavit must contain is the statute. Whether the judgment rendered upon the publication is valid or invalid may depend upon the statute being complied with, but not necessarily so. The affidavit and every other step in the proceeding may be made and taken in strict conformity to the statute, and yet the judgment be void be-

[1] Atkins *v.* Atkins, 9 Neb. 200; 2 N. W. Rep. 466; Forbes *v.* Hyde, 31 Cal. 342, 349; Britton *v.* Larson, 23 Neb. 806; 37 N. W. Rep. 681; Pennoyer *v.* Neff, 95 U. S. 714, 721.

[2] Anderson *v.* Goff, 72 Cal. 68; 13 Pac. Rep. 73; Carnes *v.* Mitchell, 82 Ia. 601; 48 N. W. Rep. 941.

[3] Anderson *v.* Goff, 72 Cal. 68; 13 Pac. Rep. 73.

cause the case is one in which a judgment can not legally be had upon constructive service.[1]

If the affidavit is not required by the statute to state the fact of non-residence it need not be stated therein, but may be established by other evidence.[2] But it does not follow that a judgment against one who is not a non-resident would be valid because an affidavit conforming to the statute has been filed. The fact of non-residence may still be a jurisdictional fact that must be established to give the court authority to act.[3] And some of the cases go further, and hold that under such a statute this jurisdictional fact need not be proved at all, in the case in which the judgment was rendered, if it in fact existed. The judgment may be upheld, when attacked, by then proving the fact of non-residence.[4]

It must be borne in mind, however, that it is so held solely because the statute does not require that the affidavit shall allege the fact of non-residence. If it were required by the statute to be stated in the affidavit, the allegation could not be dispensed with and the defect could not be supplied by other evidence however convincing.[5] The filing of such an affidavit as the statute requires is a condition precedent to an authorized publication. Without it a judgment rendered on such notice is void, and the making of such an affidavit, after the publication, is of no effect.[6]

As this mode of conferring jurisdiction is purely statutory whatever the statute requires can not be dispensed with.[7] But it has been held that the affidavit is not a

[1] *Ante*, secs. 13, 32, 33; Taylor *v.* Ormsby, 66 Ia. 110; 23 N. W. Rep. 288; Sweeley *v.* Van Steenburg, 69 Ia. 697; 26 N. W. Rep. 78.

[2] Taylor *v.* Ormsby, 66 Ia. 110; 23 N. W. Rep. 288; Carnes *v.* Mitchell, 82 Ia. 601; 48 N. W. Rep. 941.

[3] Taylor *v.* Ormsby, 66 Ia. 110; 23 N. W. Rep. 288; Sweeley *v.* Van Steenburg, 69 Ia. 697; 26 N. W. Rep. 78.

[4] Sweeley *v.* Van Steenburg, 69 Ia. 697; 26 N. W. Rep. 78.

[5] Carnes *v.* Mitchell, 82 Ia. 601; 48 N. W. Rep. 941.

[6] Barber *v.* Morris, 37 Minn. 194; 33 N. W. Rep. 559.

[7] Barber *v.* Morris, 37 Minn. 194; 33 N. W. Rep. 559; Anderson *v.* Co-

part of the judgment roll, and that it will be presumed in aid of the jurisdiction of the court that such affidavit was made and that an affidavit of publication and a recital thereof in the record are conclusive.[1]

Under most of the statutes it is not enough to show that the party is a non-resident. It must appear, in addition, that the cause of action is such that constructive service of notice is proper.[2] And in some of the cases it is held that such a cause of action must be shown by a verified complaint.[3] This, however, is based upon an express statutory provision requiring the complaint to show a sufficient cause of action. Under a statute requiring the application for the order to be based upon the complaint, duly verified and filed, the complaint must be on file at the time the order is made.[4] And must show the cause of action to be one upon which publication is authorized.[5]

In some of the states the facts authorizing the service by publication, including the nature of the cause of action, must appear by affidavit. But even where this is the case, if the complaint is verified, it may be referred to in the affidavit for the necessary facts as to the cause of action. And in some of the states where a verified complaint, together with the affidavit, is required to be made the basis of the application, the cause of action need not be shown by the affidavit, but the court may look to the complaint to ascertain whether a cause of action appears or not.[5] But if the complaint is not verified, the affidavit must state the facts showing a cause of action against the defendant. It is not enough to state, in the language of the statute, that the plaintiff has a good cause of action

burn, 27 Wis. 562; Cummings *v.* Tabor, 61 Wis. 185, 189; 21 N. W. Rep. 72.

[1] In re Newman, 75 Cal. 213, 220; 16 Pac. Rep. 887; *ante*, sec. 23, p. 142; Hardy *v.* Beaty, 19 S. W. Rep. 778.

[2] Crouch *v.* Martin, 47 Kan. 313; 27 Pac. Rep. 985.

[3] Bryan *v.* University Pub. Co., 112 N. Y. 382; 19 N. E. Rep. 825.

[4] Cummings *v.* Tabor, 61 Wis. 185, 189; 21 N. W. Rep. 72.

[5] Cummings *v.* Tabor, 61 Wis. 185, 188; 21 N. W. Rep. 72; County of Yolo *v.* Knight, 70 Cal. 431; 11 Pac. Rep. 662.

against him.[1] The same rule applies to the allegation that the party against whom publication is sought is a necessary party to the action.[2] But this clause of the statute is liberally construed in favor of jurisdiction, and an imperfect and very general statement of the cause of action is held to be sufficient to uphold the judgment upon a collateral attack.[3] It is not always sufficient in making the showing of facts required to follow the language of the statute.[4] In most of the states, in order to justify the giving of notice by publication, it must appear by the affidavit that the defendant is a non-resident, or that he can not, after due diligence, be found within the state. And it is not sufficient to state generally that he can not, after due diligence, be found. The facts showing what was done in the effort to ascertain the defendant's whereabouts must be stated so that the court may determine whether the acts done constitute due diligence or not.[5] If, however, any facts are stated tending to show that due diligence was used, this gives the court jurisdiction to determine whether such facts are sufficient or not. And if the court holds them to be sufficient, however erroneous the ruling may be, a judgment founded upon the notice given under it is not void, and can not be impeached collaterally.[6] And the statement of a fact inferentially and insufficiently, will not render the judgment void, but voidable only.[7] What is necessary to constitute due diligence

[1] County of Yolo *v.* Knight, 70 Cal. 431; 11 Pac. Rep. 662; Ricketson *v.* Richardson, 26 Cal. 153; Forbes *v.* Hyde, 31 Cal. 352; Bacon *v.* Johnson, 110 N. C. 114; 14 S. E. Rep. 508.

[2] Id.

[3] Shippen *v.* Kimball, 47 Kan. 173; 27 Pac. Rep. 813.

[4] Ligare *v.* California S. R. R. Co., 76 Cal. 610; 18 Pac. Rep. 777; County of Yolo *v.* Knight, 70 Cal. 431; 11 Pac. Rep. 662.

[5] Ricketson *v.* Richardson, 26 Cal. 149, 153; Ligare *v.* California S. R. R. Co., 76 Cal. 610; 18 Pac. Rep. 777; Jewett *v.* Jewett, 2 N. Y. Sup. 250; Landrue *v.* Lund, 38 Minn. 538; 38 N. W. Rep. 699; McDonald *v.* Cooper, 32 Fed. Rep. 745; Alderson *v.* Marshall, 7 Mont. 288; 16 Pac. Rep. 576; Beach *v.* Beach, 6 Dak. 371; 43 N. W. Rep. 701; McCracken *v.* Flanagan, 127 N. Y. 493; 28 N. E. Rep. 385.

[6] Belmont *v.* Cornen, 82 N. Y. 256.

[7] Long *v.* Fife, 45 Kan. 271; 25 Pac. Rep. 594.

can not be stated with any definiteness. Each case must necessarily be governed by its own facts and circumstances. And the opinions of the different courts on the subject are so much dependent upon the different views of individual judges, that they furnish us no safe guide.

Where it is made necessary by statute to show that the defendant has property within the state, it is held that the statement thereof in the affidavit should be direct, and specify the property.[1] And that it is not sufficient to state it on information and belief.[2] This may be so as to the allegation of property within the state, but as to some of the facts required to be stated, it is frequently impossible to state them in any other way. Therefore, it is not necessary that such matters should be stated positively. They may be stated on information and belief.[3] If the residence of the defendant is known to the plaintiff, it must be stated where a copy of the summons or notice is required to be sent to the defendant, or if the place of residence is unknown, it must be so stated.[4] In some cases it is held that if the affidavit states that the defendant is a non-resident, and the place of his residence is given, no effort to find him within the state need be shown.[5] But the statement that the defendant is out of the state must, in order to avoid the necessity of alleging diligence to find him within the state, be direct and positive.[6] And in other cases it is held that the mere allegation of non-residence is not enough, as non-residence is not inconsistent with the actual presence of the defendant within the state.[7] But it has been held that where non-residence is alleged,

[1] McDonald *v.* Cooper, 32 Fed. Rep. 745, 751; Feikert *v.* Wilson, 38 Minn. 341; 37 N. W. Rep. 585.

[2] Feikert *v.* Wilson, 38 Minn. 341; 37 N. W. Rep. 585.

[3] Colton *v.* Rupert, 60 Mich. 318; 27 N. W. Rep. 520. But see on this point Waggoner *v.* Fogelman, 13 S. W. Rep. 729.

[4] Ricketson *v.* Richardson, 26 Cal. 149, 154; Fetes *v.* Volmer, 8 N. Y. Sup. 294.

[5] Anderson *v.* Goff, 72 Cal. 68; 13 Pac. Rep. 73; McDonald *v.* Cooper, 32 Fed. Rep. 745, 748; Furnish *v.* Mullan, 76 Cal. 646; 18 Pac. Rep. 854.

[6] Carleton *v.* Carleton, 85 N. Y. 313.

[7] Carleton *v.* Carleton, 85 N. Y. 313; Pike *v.* Kennedy, 15 Or. 420; 15

and, also, that the "defendants can not, after due diligence, be found within the state," and summons can not be served personally, "because of such non-residence," the affidavit is sufficient.[1] It must appear from the affidavit either that due diligence has been used to find the defendant within the state, or that an effort to find him would be of no avail.[2] Allegations in the affidavit, made on information and belief, are proper to be considered.[3] And the return of the proper officer made on a summons issued in the case, tending to show diligence and a failure to find the defendant, may be made part of the affidavit by reference to it.[3]

In most of the statutes it is required that the affidavit shall state briefly the object and general nature of the complaint or petition. But less strictness has been enforced by the courts under this clause of the statute, probably, than any other. A very general statement of the nature and objects of the action has been held to be sufficient.[4]

As a rule, the affidavit must disclose the name of the party against whom publication is asked, and the order and publication must run in his name. But under some of the statutes defendants may be proceeded against by publication by fictitious names, or as unknown, upon a showing by a sworn complaint or affidavit that the name of the party is unknown, and can not, after due diligence, be ascertained. Under such a statute, it is not sufficient to show that the unknown defendant is a non-resident. It must also be shown that the name of such defendant is unknown and can not be ascertained upon diligent inquiry.[5]

If the affidavit falsely states that the plaintiff has a

Pac. Rep. 637; Fetes *v.* Volmer, 8 N. Y. Sup. 294; McCracken *v.* Flannagan, 127 N. Y. 493; 28 N. E. Rep. 385.

[1] Kennedy *v.* The N. Y. L. Ins. & Trust Co., 101 N. Y. 487; 5 N. E. Rep. 774; Pike *v.* Kennedy, 15 Or. 420; 15 Pac. Rep. 637.

[2] Pike *v.* Kennedy, 15 Or. 420; 15 Pac. Rep. 637; McDonald *v.* Cooper, 32 Fed. Rep. 745, 750.

[3] Howe Machine Co. *v.* Pettibone, 74 N. Y. 68.

[4] Adams *v.* Cowles, 95 Mo. 501; 8 S. W. Rep. 711.

[5] Bleidom *v.* Pilot Mountain Coal, etc., Co., 15 S. W. Rep. 737.

cause of action when he has not, and judgment is recovered on the constructive notice given under it, the judgment will be set aside on the ground that it was fraudulently obtained.[1] But this right must rest upon the doctrine that a judgment recovered by fraud may be set aside, and not on the ground that the court had not jurisdiction to render it. Such a doctrine as the latter would leave it open for any one to attack a judgment by showing that some of the jurisdictional facts shown by the affidavit did not exist, without any reference to any intention of the party making the affidavit to misstate the fact or to obtain an undue advantage. And certainly the jurisdiction of the court could not be attacked collaterally on any such ground.[2]

The affidavit of non-residence must relate to the time of the order for publication, and must be made at or near the time the order is made.[3] But it is sufficient if made so near the time as to render it reasonably certain that no change could have taken place affecting the right to have such publication.[4]

It is not necessary that the affidavit be made at the time of the filing of the complaint or petition, or that the averment of non-residence shall relate to that time.[5]

In some cases the statute provides for the filing of the complaint or declaration *after* proof of publication is made. In such cases it is held that if the complaint is filed before the affidavit of publication is made, a judgment rendered thereon is void.[6] In others, the affidavit can not legally be made until after the complaint is filed. But the date appearing in or upon the order is not conclusive as to the time, and it may be corrected to conform

[1] Dunlap *v.* Steere, 92 Cal. 344; 28 Pac. Rep. 563.

[2] Lawson *v.* Moorman, 85 Va. 880; 9 S. E. Rep. 150.

[3] Forbes *v.* Hyde, 31 Cal. 342, 351; People *v.* Huber, 20 Cal. 81; Crombie *v.* Little, 47 Minn. 581; 50 N. W. Rep. 823.

[4] Crombie *v.* Little, 47 Minn. 581; 50 N. W. Rep. 823; Cornwall *v.* Falls City Bank, 18 S. W. Rep. 452.

[5] Bogle *v.* Gordon, 39 Kan. 31; 17 Pac. Rep. 857.

[6] Nugent *v.* Nugent, 70 Mich. 52; 37 N. W. Rep. 706; Steere *v.* Vanderberg, 67 Mich. 530; 35 N. W. Rep. 110.

to the facts, or it may be shown that it was in fact filed at the proper time to give the court jurisdiction.[1]

A misnomer of either the plaintiff or defendant in the affidavit renders a judgment under it void where there is no appearance.[2]

Where an affidavit is defective, but not void, it is held in some of the cases that it may be amended after judgment, for example, by making an affidavit on information and belief positive.[3] Or by changing an inferential or insufficient statement of a fact to a direct and positive statement.[4] But no amendment could be allowed by the addition of a material allegation entirely omitted from the affidavit, because such an affidavit would, as we have seen, be absolutely void, the court would have no jurisdiction, and the judgment would be void. Jurisdiction can not be conferred after an act is done, and thus breathe life into a void judgment.

That to serve process personally would be difficult and expensive, is no ground for publication even under a statute authorizing constructive service where personal service is "impracticable."[5]

Except in those states in which a cause of action authorizing constructive service must be shown by the complaint, the affidavit is the sole basis of the publication, or the order therefor, and the insufficiency of the complaint is no ground for setting aside notice.[6]

c. Officer's return as basis for publication. Sometimes the facts, or a part of them, necessary to authorize constructive service of process may, or must, under statutory provisions, be shown by the return of the proper officer on the summons or citation. If so, the return of the officer takes the place of the affidavit, to that extent, and must bring the case within the statute in order to justify the

[1] Voelz *v.* Voelz, 80 Wis. 504; 50 N. W. Rep. 398.
[2] Newman *v.* Bowers, 72 Ia. 465; 34 N. W. Rep. 212.
[3] Harrison *v.* Beard, 30 Kan. 532; 2 Pac. Rep. 632.
[4] Long *v.* Fife, 45 Kan. 271; 25 Pac. Rep. 594.
[5] Batt *v.* Procter, 45 Fed. Rep. 515.
[6] Mehrhoff *v.* Diffenbacker, 31 N. E. Rep. 41.

publication of the summons, and thereby give the court jurisdiction.[1]

d. The order for publication.—The order for publication must conform to the statute and require every act to be done that is necessary to constitute a sufficient notice by publication.[2] If the statute requires the summons to be mailed to the defendant as well as published, the order must direct such mailing or the judgment will be void.[3] And usually it is required to recite the facts contained in the affidavit as a basis for the order.[4] The order is the authority for making the service, whatever it may be, and if it provides for a service not authorized, the fact that a proper service, not called for by the order for publication, is actually made, can not cure the defect.[5]

In some of the states, it is required by the statute that the order shall require the defendant to appear on a day named, for example, on the first day of the next term of the court. And under such a statute, it is held that an order requiring an appearance at an earlier day is void and notice in conformity thereto gives no jurisdiction.[6] But in most of the states a specific day for the appearance is not required to be fixed, but the defendant must appear and answer within a certain number of days after publication. Under such statutes, it has been held that a judgment rendered upon default before the expiration of the time within which the defendant is required to answer is not void but erroneous merely and can not be attacked collaterally.[7] And in some proceedings the filing of the petition is held to give the court jurisdiction, and in such

[1] Eliot *v.* McCormick, 144 Mass. 10; 10 N. E. Rep. 709; Guaranty Trust, etc., Co. *v.* Buddington, 27 Fla. 215; 9 Sou. Rep. 251.

[2] Ricketson *v.* Richardson, 26 Cal. 149, 153; Park *v.* Higbee, 24 Pac. Rep. 524; Fetes *v.* Volmer, 8 N. Y. Sup. 294.

[3] Park *v.* Higbee, 24 Pac. Rep. 524; Fetes *v.* Volmer, 8 N. Y. Sup. 294; Beaupre *v.* Keefe, 79 Wis. 436; 48 N. W. Rep. 596.

[4] Ricketson *v.* Richardson, 26 Cal. 149, 153.

[5] Beaupre *v.* Keefe, 79 Wis. 436; 48 N. W. Rep. 596.

[6] Payne's Adm'r *v.* Hardesty, 14 S. W. Rep. 348; Brownfield *v.* Dyer, 7 Bush, 505; Bird *v.* Norquist, 46 Minn. 318; 48 N. W. Rep. 1132.

[7] In re Newman, 75 Cal. 213; 16 Pac. Rep. 887.

cases the giving of notice for too short a time does not affect such jurisdiction or render an order made under it void.[1]

Where the statute requires that the publication be made in a paper most likely to give notice to the defendant, the fact that it is such a paper need not be set out in the order.[2]

Under a statute requiring an order for publication, or service out of the state, at the option of the plaintiff, the order need not be in the alternative, but may order either kind of service. The plaintiff should exercise his option before the order is made, and if he does not, an order for either kind of service allowed will be valid.[3]

Where the fixing of the time for publishing notice is left to the court, an order fixing such time will be upheld, even in case of a direct attack, unless injustice appears to have been done.[4] And such an order will render a judgment valid, however short the time fixed may be, as against a collateral attack.

e. The publication.—As to what the publication shall be, the statutes of the several states differ. In some a publication of the summons is required, in which case the service is the same, as respects the form of the notice, as personal service. In other states a notice containing the substance of the summons, or a citation, is required. In either case the requirements of the statute must be substantially complied with. But mere irregularities in the form of the notice, or the publication of it, while they may be ground for setting aside the service, or of a direct attack upon it in some other form, will not render it void or deprive the court of jurisdiction.[5] In some cases, however, a defect in the service that would be a mere error if the summons were personally served, for example, in case

[1] Mohr *v.* Manierre, 101 U. S. 417.

[2] Calvert *v.* Calvert, 15 Colo. 390; 24 Pac. Rep. 1043.

[3] In re Field, 131 N. Y. 184; 30 N. E. Rep. 48.

[4] Osgood *v.* Osgood, 153 Mass. 38; 26 N. E. Rep. 413.

[5] *Post*, sec. 40; Webster *v.* Daniel, 14 S. W. Rep. 550; Adams *v.* Cowles, 95 Mo. 501; 8 S. W. Rep. 711; 1 Black on Judg., sec. 223.

of a misnomer of the defendant, in the summons, will render the judgment void in case of publication.[1]

The question whether the publication of the notice, or summons, for a shorter time than that required by law, is sufficient to give the court jurisdiction, and is only subject to a direct attack, as an irregularity, is not free from doubt. In case of personal service of summons, it is well settled that a service for too short a time before judgment is taken is a mere defect, and does not render the judgment void.[2]

There is no good reason why the same rule should not apply in case of a publication of a summons regular in all other respects. And it has been held, in some of the cases, that a judgment rendered under such circumstances

[1] Skelton *v.* Sackett, 91 Mo. 377; 3 S. W. Rep. 874; Newman *v.* Bowers, 72 Ia. 465; 34 N. W. Rep. 212.

"It is very clear from the above case that, when a party is sued by a wrong name, and service of the writ is actually made on the person intended, and he does not appear and plead in abatement, that the judgment rendered in such case is not void. But a distinction exists between such a case and a case where the suit is against a non-resident, where the only notice is by publication of notice, and no appearance is made. In the former case, where there is a mistake in the name, and the writ is served on the right party, he is thereby informed that he is the person meant; and, to take advantage of the misnomer, he must appear and plead the misnomer in abatement.

"In the latter case, when a wrong name is used in an order of publication, the party really intended receives no such notice that he is the party intended as one who is personally served with a writ, which service designates him as the person meant to be sued. While the service of the writ in the former case is a demonstration that the person upon whom it is served is the person intended to be sued, in the latter case notice by publication is a proceeding against the name, and, to give such notice as the service of a writ imparts, it should be correctly set forth, and, if it is not so set forth, it is ineffectual as a notice. It would seem that an order of publication of notice against J. Smith would impart the same notice to James, Joseph, John, Jonathan, or Jackson Smith, but it would not impart to any one of them notice of the fact that he was the J. Smith intended by the notice, while the service of a writ upon any one of them would inform him that he was the Smith intended. These views seem to be supported by the cases of Gardner *v.* State, 4 Ind. 632; Entrekin *v.* Chambers, 11 Kan. 368; Bray *v.* McClury, 55 Mo. 128." Skelton *v.* Sackett, 91 Mo. 377; 3 S. W. Rep. 875.

[2] *Ante*, secs. 13, 23; Freeman on Judg., sec. 126; Webster *v.* Daniel, 14 S. W. Rep. 550.

is not void.[1] But there are cases holding that a summons requiring the defendant to answer within a shorter time than that fixed by the statute is void.[2] And it must be remembered that in certain kinds of proceedings, for example, in petitions for the sale of property by a guardian, the filing of the petition vests the court with jurisdiction, and the fact that the notice was not published for the length of time required will not render the proceedings of the court void as to the ward.[3] But the true reason for distinguishing proceedings of this kind from the publication of a summons in an ordinary adversary proceeding is that the proceeding is not adverse to the ward.[4] It is held, however, that where a return day is fixed in the summons, and the day named is less than the time required, after the publication has run its time, a judgment rendered on that day is void.[5]

[1] In re Newman, 75 Cal. 213; 16 Pac. Rep. 887; Davis *v.* Robinson, 70 Tex. 394; 7 S. W. Rep. 749, 753.

[2] Bell *v.* Good, 19 N. Y. Sup. 693.

[3] "We shall assume, however, that the notice was not published for the full period prescribed, and the question for consideration is whether such omission, all other requisites of the statute having been complied with, rendered the order of the court invalid as against the plaintiff, Mohr, the then lunatic; or, in other words, whether such publication was essential to the jurisdiction of the court to grant the license to sell. The supreme court of the state, in a case brought by this plaintiff—Mohr *v.* Tulip—which came before it in 1876, affecting a part of the premises sold at the same guardian's sale upon substantially the same proofs here presented, held that the sale was invalid for want of sufficient publication of such notice. On the other hand, the Supreme Court of the United States, in considering the validity of a sale of a decedent's estate under a statute in force in what was then the territory of Wisconsin, requiring the county court, before passing upon the application for a license to sell, to order notice of its hearing to be given to all parties interested who did not signify their assent to the sale, had held, as far back as 1844, after deliberate consideration, that the absence of such notice from the record, or the fact that no such notice was given, did not affect the jurisdiction of the court, but was merely a matter of error, to be corrected by an appellate tribunal; and this decision has been repeatedly recognized as correctly marking the distinction between matters of error and matters of jurisdiction in proceedings for the sale of such estates. Grignon's Lessee *v.* Astor, 2 How. 319." Mohr *v.* Manierre, 101 U. S. 420.

[4] Scarf *v.* Aldrich, 32 Pac. Rep. 324; Gager *v.* Henry, 5 Sawyer (U. S. Cir. Ct.), 243; Mohr *v.* Manierre, 101 U. S. 420.

[5] Bird *v.* Norquist, 46 Minn. 318; 48 N. W. Rep. 1132; Guaranty Trust,

The relief demanded in the petition, and of which notice is given in the publication, limits the jurisdiction of the court to grant relief, where there is no appearance, and no other can be given.[1]

The death of a party against whom publication is being made, and before the same is complete, suspends the notice, as well as the action, and a new notice must be given to substituted parties.[2]

Where the time for which publication shall be made is measured, in the statute, by months, the term is usually construed to mean calendar and not lunar months, in this country, although the opposite construction prevailed in England until changed by statute.[3]

The fact that one of the necessary publications was made on a legal holiday does not affect the validity of the judgment.[4]

As to what is a sufficient length of time for the publication of summons or notice, see the authorities cited below.[5]

f. Proof of publication.—The validity of a judgment does not depend upon the proof of publication, but upon the fact that the proper publication has been made.[6] There-

etc., Co. *v.* Buddington, 27 Fla. 215; 9 Sou. Rep. 246; Payne *v.* Hardesty, 14 S. W. Rep. 348.

[1] Vorce *v.* Page, 28 Neb. 294; 44 N. W. Rep. 452; Stuart *v.* Anderson, 70 Tex. 588; 8 S. W. Rep. 295.

[2] Paget *v.* Pease, 2 N. Y. Sup. 335; Reilly *v.* Hart, 8 N. Y. Sup. 717; Reilly *v.* Hart, 130 N. Y. 625; 29 N. E. Rep. 1099.

[3] Guaranty Trust, etc., Co. *v.* Buddington, 27 Fla. 215; 9 Sou. Rep. 246; Guaranty Trust, etc., Co. *v.* Green Cove, etc., R. Co., 139 U. S. 137; 11 Sup. Ct. Rep. 512, 515.

[4] Malmgren *v.* Phinney, 52 N. W. Rep. 915.

[5] Davis *v.* Robinson, 70 Tex. 394; 7 S. W. Rep. 749; Traylor *v.* Lide, 7 S. W. Rep. 58; Frisk *v.* Reigelman, 75 Wis. 499; 43 N. W. Rep. 1117; Security Co. *v.* Arbuckle, 123 Ind. 518; 24 N. E. Rep. 329; Bleidorn *v.* Pilot Mountain Coal, etc., Co., 89 Tenn. 166, 204; 15 S. W. Rep. 737; In re Koch's Will, 12 N. Y. Sup. 94; Market Nat. Bank *v.* Pac. Nat. Bank, 89 N. Y. 397; Guaranty Trust, etc., Co. *v.* Buddington, 27 Fla. 215; 9 Sou. Rep. 246; Guaranty Trust, etc., Co. *v.* Green Cove, etc., R. Co., 139 U. S. 137; 11 Sup. Ct. Rep. 512; State *v.* Georgia Co., 109 N. C. 310; 13 S. E. Rep. 861; Cox *v.* North Wis. Lum. Co., 51 N. W. Rep. 1130.

[6] In re Newman, 75 Cal. 213, 220; 7 Am. St. Rep. 146; 16 Pac. Rep.

fore an omission to make the formal proof may be supplied even after judgment.[1] Or, in case the proof can not be found, it will be presumed.[2] And the proof may be amended to conform to the facts in order to show a sufficient publication.[3]

The failure to make the proof in the prescribed form is a mere irregularity and does not render the judgment void.[4] But where a judgment appears on its face to be void, the right to supply or amend the proof of publication so as to show it to be valid must be subject to intervening rights of third parties acquired in good faith.[5] And it must be remembered that in some of the cases it is held that the facts necessary to show jurisdiction must affirmatively appear on the face of the record in case of publication against a non-resident defendant, even in case of a collateral attack,[6] which is inconsistent with the doctrine that the necessary facts may be established by evidence *dehors* the record. But the great weight of authority is certainly the other way.

The affidavit of publication is usually required to be made by some specified person, for example, the printer of the paper in which the publication is made. But as it is the fact of publication, and not the proof of it, that gives jurisdiction, there can be no valid reason why proof of the fact may not be made in some other way.[7] And in

887; Mason *v.* Messenger, 17 Ia. 263; Sichler *v.* Look, 93 Cal. 600, 608; 29 Pac. Rep. 220; Heinlen *v.* Heilbron, 94 Cal. 636, 641; 30 Pac. Rep. 8; In re Schlee, 65 Mich. 362; 32 N. W. Rep. 717, 723; Wilkinson *v.* Conaty, 65 Mich. 614; 32 N. W. Rep. 841, 846; Burr *v.* Seymour, 43 Minn. 401; 45 N. W. Rep. 715; Webster *v.* Daniel, 14 S. W. Rep. 550.

[1] Britton *v.* Larson, 23 Neb. 806; 37 N. W. Rep. 681; Wilkinson *v.* Conaty, 65 Mich. 614; 32 N. W. Rep. 841, 846; Burr *v.* Seymour, 43 Minn. 401; 45 N. W. Rep. 715.

[2] Sichler *v.* Look, 93 Cal. 600, 608; 29 Pac. Rep. 220.

[3] Hackett *v.* Lathrop, 36 Kan. 661; 14 Pac. Rep. 220; Frisk *v.* Reigelman, 75 Wis. 499; 43 N. W. Rep. 1117.

[4] Webster *v.* Daniel, 14 S. W. Rep. 550, 552.

[5] Burr *v.* Seymour, 43 Minn. 401; 45 N. W. Rep. 715.

[6] Freeman on Judg., sec. 127; Galpin *v.* Page, 18 Wall. 350; Guaranty Trust, etc., Co. *v.* Buddington, 27 Fla. 233; 9 Sou. Rep. 251.

[7] In re Schlee, 65 Mich. 362; 32 N. W. Rep. 717, 723.

some of the statutes the right to prove it by other persons having knowlege of the fact is expressly given.[1]

In case of the publication of a warning order, or other notice, the order or notice takes the place of the summons and the proof of publication supplies the place of the return of the officer, and the same rule as to their legal effect generally applies.[2]

It has been held that if the necessary facts appear by way of recital, and not by direct averment, the affidavit is sufficient.[3]

Where a judgment is attacked after the lapse of many years, but slight evidence of the facts necessary to uphold it will be held to be sufficient where the original affidavits can not be found and the record is silent.[4]

Recitals in the record showing due service may, in the absence of any thing appearing to the contrary, supply the place of actual proof of publication.[5]

g. Personal service out of the state.—As we have seen, personal service out of the state is authorized in some of the states, but such service is only allowed where constructive service against a non-resident is authorized and upon the same showing, and it is constructive service only, in its legal effect.[6] And in some of the cases it is held that such service can not be had until an order for publication has been made.[7] Usually the length of time after service within which to answer is the same as is allowed after publication has run its full time.[8]

[1] Taylor *v.* Coots, 32 Neb. 30; 48 N. W. Rep. 964.

[2] Webster *v.* Daniel, 14 S. W. Rep. 550.

[3] Farmers Nat. Bank *v.* Fonda, 65 Mich. 533; 32 N. W. Rep. 664.

[4] Clyburn *v.* Reynolds, 31 S. C. 91; 9 S. E. Rep. 973, 978.

[5] *Ante*, secs. 22, 23; Davis *v.* Robinson, 70 Tex. 394; 7 S. W. Rep. 749; Beattie *v.* Wilkinson, 36 Fed. Rep. 646.

[6] *Ante*, secs. 13, 15, 32; 1 Black on Judg., sec. 228; Williams *v.* Welton, 28 Ohio St. 451; Crouter *v.* Crouter, 17 N. Y. Sup. 758.

[7] McBlain *v.* McBlain, 77 Cal. 507; McBlane *v.* McBlane, 20 Pac. Rep. 61.

[8] Market Nat. Bank *v.* Pacific Nat. Bank, 89 N. Y. 397; Crouter *v.* Crouter, 17 N. Y. Sup. 758.

39. Proof of service of process. Proof of service of process in case of constructive service has been considered.[1] And attention has been given to the subject of the service.[2]

It remains for us to consider how the service is to be proved after it has been made. This is a subject of much less consequence than the service itself, because it is the latter that gives jurisdiction, and the proof of it, if defective, can generally be amended to conform to the facts.[3]

Usually, as we have seen elsewhere, the duty of serving process is imposed upon some officer, by statute, who is alone authorized to serve the same.[2] Sometimes this is provided by rules of court, as in the equity rules of the federal courts.[4] And the power to appoint some one to make service, when the officer can not act, is usually reserved to the courts.[5]

Where an officer is required to serve process, the proper proof of service is a return by him.[6] But in many of the states authority to serve original process is given, by statute, to private individuals having certain specified qualifications.[2] And where this is the case the usual and proper mode of proving the service is by the affidavit of such person. But these modes of proving service are not exclusive of all others as a rule. It is the fact of service that is the material thing, and if the proof can not, for any reason, be made in the mode indicated, there is no reason why the fact may not be proved by other evidence satisfactory to the court.[7] But it is held in some of the cases that parol proof can not be heard to aid the officer's return.[8] And this is un-

[1] *Ante*, sec. 38. [2] *Ante*, sec. 37.

[3] *Ante*, sec. 38; *post*, sec. 40; Heinlen *v.* Heilbron, 94 Cal. 636, 641; 30 Pac. Rep. 8.

[4] Martin *v.* Gray, 142 U. S. 236; 12 Sup. Ct. Rep. 186; Barton's Suit in Eq. 69.

[5] *Ante*, sec. 37; Martin *v.* Gray, 142 U. S. 236; 12 Sup. Ct. Rep. 186.

[6] Fairfield *v.* Paine, 23 Me. 498; 41 Am. Dec. 357; Barton's Suit in Eq. 68.

[7] *Ante*, sec. 38; Perri *v.* Beaumont, 88 Cal. 108; 25 Pac. Rep. 1109; Heinlen *v.* Heilbron, 94 Cal. 636, 641; 30 Pac. Rep. 8.

[8] Botsford *v.* O'Conner, 57 Ill. 78; Dickison *v.* Dickison, 124 Ill. 483; 16 N. E. Rep. 861; Fairfield *v.* Paine, 23 Me. 498; 41 Am. Dec. 357.

doubtedly true where the question arises on appeal, because, in such case, the record alone can be looked to in determining whether jurisdiction was obtained or not.[1]

Whether the proof is made by an officer's return or by the affidavit of a private individual, the facts necessary to show a valid service are the same. And the facts constituting the service must be stated so that the court may determine whether it was a sufficient service or not. A return that the writ was served, or duly served, states a mere conclusion, and is insufficient.[2] But it has been held that a return of service without specifying how the service was made imports, and will be construed to mean, personal service.[3]

It is sometimes required that the affidavit of the individual shall show, in addition to the facts necessary to prove a valid service, the facts showing his competency, under the statute, to make the service.[4] But, if personal service is shown, the failure to state facts showing the necessary qualifications of the party is an irregularity, merely, and will not make a judgment rendered upon it void.[5] In all other respects the oath of the individual is the equivalent of the return of the officer.[6] So that we may safely consider the requisites of the two modes of service together.

Usually it is sufficient to show that the summons, or other writ, was served on the defendant, personally within the jurisdiction of the court.[7] In the federal courts the return must show service within the district over which the court has jurisdiction.[8]

Frequently statutes require also a copy of the com-

[1] Doerfler *v.* Schmidt, 64 Cal. 265; 30 Pac. Rep. 816; Sichler *v.* Look, 93 Cal. 600; 29 Pac. Rep. 220.

[2] Hodges *v.* Hodges, 6 Ia. 78; 71 Am. Dec. 388.

[3] Colerick *v.* Hooper, 3 Ind. 316; 56 Am. Dec. 505.

[4] Doerfler *v.* Schmidt, 64 Cal. 265; 30 Pac. Rep. 816; Horton *v.* Gallardo, 88 Cal. 581; 26 Pac. Rep. 375.

[5] Peck *v.* Strauss, 33 Cal. 678. [6] Barton's Suit in Equity, 68, 69.

[7] *Ante*, sec. 15.

[8] Miller *v.* Norfolk & N. R. Co., 41 Fed. Rep. 431; *ante*, secs. 13, 15.

plaint, or other pleading of the plaintiff, be served with the writ on one or more of the defendants.[1] Where this is required the proof must show it or a judgment rendered by default will appear on the face of the record to be void. So where the statute requires that a copy of the summons be left with the defendant, it was held that proof that the same was delivered to him did not show a valid service.[2] But so strict a rule would seem to be unreasonable.

If a certified copy is required to be served it is not sufficient to show that a copy was served, without showing that it was certified.[3] And if a copy is required to be delivered to each of the defendants the return must show that this was done or it will be insufficient.[4]

If a delivery of the writ or notice is required it is immaterial how it is delivered, whether by the hand of an officer, by mail, or otherwise. The proof of an actual delivery to the party to be served however accomplished, shows personal service and is sufficient.[5] And if the return shows personal service on the defendant the failure to show that a copy of the summons was left, as required by the statute, is a mere irregularity, the return shows jurisdiction in the court, and does not subject the judgment to collateral attack.[6]

Where service by mail is authorized it is usually held to be sufficient to make proof that the writ or notice was deposited in the post-office, properly addressed, postage prepaid.[5] But if required, the place of residence of the

[1] *Ante*, sec. 37.

[2] Hall *v.* Graham, 49 Wis. 553; 5 N. W. Rep. 943; Wilkinson *v.* Chilson, 71 Wis. 131; 36 N. W. Rep. 836.

[3] Lauderdale *v.* Ennis Stationary Co., 80 Tex. 496; 16 S. W. Rep. 308.

[4] Rutherford *v.* Davenport, 16 S. W. Rep. 110; Stewart *v.* Stringer, 41 Mo. 400; 97 Am. Dec. 278; Wilkinson *v.* Chilson, 71 Wis. 131; 36 N. W. Rep. 836.

[5] Heinlen *v.* Heilbron, 94 Cal. 636, 640; 30 Pac. Rep. 8.

[6] Drake *v.* Dubenick, 45 Cal. 455, 463.

party or attorney sending, and to whom the notice is sent, must be shown.[1]

A strict compliance with statutes allowing service by leaving a copy of the writ at the residence, or last usual or usual place of residence of the defendant, is required by the courts, and a return or affidavit of such a service must show that the acts required by the statute were performed.[2] But the highest degree of certainty in the return is not required.[3]

The proof to be regular must show the place of service.[4] But if it does not, and the court is one of general jurisdiction, it will be presumed that service was made in the proper place.[5] No such presumption will be indulged in favor of the jurisdiction of an inferior court.[6]

Some of the cases holding the *service* to be invalid because the return fails to show service within the county are based upon statutory provisions to that effect.[7]

If the return fails to state the name of the person upon whom service was made it is a nullity.[8] But a variance between the name in the summons and in the return does not render the return insufficient, if it appears from the return that the defendant was served.[9]

In an action against husband and wife, a return show-

[1] Perri *v.* Beaumont, 88 Cal. 108; 25 Pac. Rep. 1109.

[2] McConkey *v.* McCraney, 71 Wis. 576; 37 N. W. Rep. 822.

[3] Bruce *v.* Cloutman, 45 N. H. 37; 84 Am. Dec. 111; Sexton *v.* Rock Island, etc., Co., 30 Pac. Rep. 164.

[4] Weis *v.* Schoerner, 53 Wis. 72; 9 N. W. Rep. 794; Taylor *v.* Ohio River R. Co., 35 W. Va. 328; 13 S. E. Rep. 1009; Kanawha & O. R. Co. *v.* Ryan, 31 W. Va. 364; 6 S. E. Rep. 924.

[5] *Ante*, sec. 25; Tallman *v.* Baltimore & O. R. Co., 45 Fed. Rep. 156; Baltimore & O. R. Co. *v.* Brant, 31 N. E. Rep. 464; Lyles *v.* Haskell, 35 S. C. 391; 14 S. E. Rep. 829; Knowles *v.* Logansport Gas. L. Co., 19 Wall. 58; Walke *v.* Bank of Circleville, 15 Ohio, 288, 298.

[6] *Ante*, sec. 25.

[7] Kanawha & O. R. Co. *v.* Ryan, 31 W. Va. 364; 6 S. E. Rep. 924; Taylor *v.* Ohio River R. Co., 35 W. Va. 328; 13 S. E. Rep. 1009.

[8] Brooks *v.* Allen, 62 Ind. 401.

[9] Veasey *v.* Brigman, 9 Sou. Rep. 728.

ing service on the husband gives no jurisdiction over the wife.[1]

Where service is allowed on one person only where some other person can not be found, the proof of service must, where service is made on the second person, show that the first could not be found.[2] In other words, where service is allowed to be made on a particular person or officer only on condition, the return must show the existence of the condition, or it is insufficient.[3] And where service is required to be made on a certain officer or agent designated in the statute, the return must show service on such officer or agent, and designate him by the name or description used in the statute.[4]

The service of a summons may be shown by the acceptance of service of the same by the defendant or his attorney.[5] But where the acceptance is required by the statute to be made in a specified way or in a particular form, the statute must be complied with or the acceptance will not be binding.[6] And where the acceptance of service is by a third party, it must be shown that he had authority to act for the party for whom he assumed to act.[7] So, where the party does not appear, proof of the genuineness of the signature to the acceptance is necessary.[8] And an acknowledgment of service can not be made by a minor or by his guardian for him.[9] It would probably be held to the contrary in some of the states, where it is held, against the clear weight of authority, that a guardian may appear in

[1] *Ante*, sec. 37; Carper *v.* Woodford, 24 Neb. 135; 38 N. W. Rep. 39.

[2] Miller *v* Norfolk & W. R. Co., 41 Fed. Rep. 431.

[3] *Ante*, sec. 37: Miller *v.* Norfolk & W. R. Co., 41 Fed. Rep. 431; Jenkins *v.* Crofton, 9 S. W. Rep. 406.

[4] Tallman *v.* Baltimore & O. R. Co., 45 Fed. Rep. 156; Dickerson *v.* Burlington, etc., R. Co., 43 Kan. 702; 24 Pac. Rep. 936.

[5] Gay *v.* Grant, 101 N. C. 206; 8 S. E. Rep. 99; Wilson *v.* Martin-Wilson Ant. Fire-Alarm Co., 149 Mass. 24; 20 N. E. Rep. 318; Downs *v.* Board of Directors, 30 Pac. Rep. 147

[6] Godwin *v.* Monds, 106 N. C. 448; 10 S. E. Rep. 1044.

[7] Finney *v.* Clark, 86 Va. 354; 10 S. E. Rep. 569.

[8] Downs *v.* Board of Directors, 30 Pac. Rep. 147.

[9] Kansas City & R. R. Co. *v.* Campbell, 62 Mo. 585; *post*, sec. 41.

an action for his ward and thereby waive the service of summons on the latter.[1]

Where service is made out of the state, the affidavit is usually required to state, in addition to the other facts, that the person served is the identical person named in the action or proceeding.[2]

Where a return day is named in the summons, the return must show service thereof the requisite time before the return day.[3] But where the service of the summons is personal, the defect in the return showing service for too short a time before the return day is an irregularity merely and does not render the judgment void or subject to collateral attack.[4]

The officer's return may be amended to conform to the facts, if it fails to show a valid service when one was actually made.[5] And this may be done after judgment.[6] But the right to amend must be subject to intervening rights acquired on the faith of the original return showing the judgment to have been void. The fact that subsequent mortgagees or other persons acquiring an interest adverse to the judgment will be injured by the enforcement thereof when validated by the amended return, can not affect the right to have the amendment made, unless such persons have been misled or influenced by the original return.[7]

If, however, the sufficiency of the service has been contested and an attempt is made to amend, after the action has been finally determined, it must be done upon notice

[1] *Post*, sec. 41; Smith *v.* McDonald, 42 Cal. 484; Richardson *v.* Loupe, 80 Cal. 490, 499; 22 Pac. Rep. 227.

[2] Cole *v.* Allen, 51 Ind. 122.

[3] Richmond & D. R. Co. *v.* Rudd, 88 Va. 648; 14 S. E. Rep. 361; Virginia F. & M. Ins. Co. *v.* Vaughan, 88 Va. 832; 14 S. E. Rep. 754.

[4] *Ante*, secs. 13, 23, 37, 38.

[5] *Ante*, sec. 38; Tyler *v.* Jewell, 11 S. W. Rep. 25; Shenandoah Val. R. Co. *v.* Ashby, 86 Va. 232; 9 S. E. Rep. 1003; Adams *v.* Basile, 35 La. Ann. 101; O'Hara *v.* Independence, etc., Co., 42 La. Ann. 226; 7 Sou. Rep. 533; Hackett *v.* Lathrop, 36 Kan. 661; 14 Pac. Rep. 220.

[6] *Ante*, sec. 38.

[7] Shenandoah Val. R. Co. *v.* Ashby, 86 Va. 232; 9 S. E. Rep. 1003.

to the party to be affected. Otherwise the amendment can not be effective.[1]

If, on appeal, the return is found to be defective but shows some service, the cause will not be dismissed, but remanded, so that the return may be amended if proper service was in fact made.[2]

The general rule is, that where the proof is made by an officer acting under oath, the same may be made in the form of a return without verification, otherwise it must be by affidavit.[3] And service made by a deputy, regularly appointed, is service by the officer, and may be shown by a return, but such return must be made in the name of the officer under whom he acts.[4] But the question whether a return made by a special deputy, not sworn, can be so made, is not definitely settled. The better rule seems to be, that in such case the party making the service is not acting under oath, and therefore the proof must be by affidavit.[4] And where such bailiff is appointed by the court, he is sometimes required by statute to make his return under oath, although vested by the appointment with the powers of the sheriff.[5]

If it does not appear whether the person appointed was sworn or not, it will be presumed, in aid of the jurisdiction, that he was sworn.[3] And it has been said, and with strong reason, that where a return is made by a special deputy, whether sworn or not, it is made under the authority and sanction of the sheriff's office, and is in legal effect the return of the sheriff.[6]

It is not always necessary that it shall be shown by the return that the person making it was a deputy. If it appears that the sheriff has adopted the act done, this has been held to be sufficient.[7] And where it does not affirm-

[1] Jenkins *v.* Crofton, 9 S. W. Rep. 406.

[2] O'Hara *v.* Independence, etc., Co., 42 La. Ann. 226; 7 Sou. Rep. 535.

[3] Johnson *v.* Johnson, 23 Fla. 413; 2 Sou. Rep. 834.

[4] Village of Glencoe *v.* The People, 78 Ill. 382.

[5] Lillard *v.* Brannin, 16 S. W. Rep. 349.

[6] Dissenting opinion of Raney, J., in Johnson *v.* Johnson, 23 Fla. 413; 2 Sou. Rep. 834.

[7] Bennethum *v.* Bowers, 133 Pa. St. 332; 19 Atl. Rep. 361.

atively appear by the return whether the party making the return was a regularly appointed deputy or not, it will be presumed that he was so appointed.[1]

It is held that, where the return is made in the name of a special deputy instead of in the name of the principal, showing personal service, the defect is only an irregularity and can not be taken advantage of by a stranger to the judgment or by collateral attack.[2] But there are cases holding to the contrary. It being held that a return made in the name of the deputy is a nullity.[3]

Ordinarily, the time when a return is made, if before judgment, is not material. But it has been held that where a writ issuing out of a court of inferior jurisdiction is required to be returned at an hour named in the statute, a return made at a later hour will not give jurisdiction.[4] If, however, the jurisdiction does not depend upon the return, but upon the service, and a defective return may be amended, as we have shown, it is quite clear that an entire failure to make the necessary proof may be supplied even after judgment.[5]

As to the effect of the officer's return, whether conclusive or not, the authorities are so conflicting as to render it impossible to lay down any positive rule on the subject. The question has been considered in another place.[6]

It may be said, in this connection, however, that the evident tendency of the later decisions is to allow the return to be impeached by other evidence even as between the parties to the action.[7]

[1] Martin *v.* Gray, 142 U. S. 236; 12 Sup. Ct. Rep. 186.

[2] Hill *v.* Gordon, 45 Fed. Rep. 276.

[3] Rowley *v.* Howard, 23 Cal. 402.

[4] Brown *v.* Carroll, 16 R. I. 604; 18 Atl. Rep. 283.

[5] *Ante*, sec. 38; Britton *v.* Larson, 23 Neb. 806; 37 N. W. Rep. 681.

[6] *Ante*, sec. 22, p. 116.

[7] *Ante*, sec. 22, p. 116; Crosby *v.* Farmer, 39 Minn. 305; 40 N. W. Rep. 71; Carr *v.* Commercial Bank, 16 Wis. 50; Wheeler & Wilson Mfg. Co. *v.* McLaughlin, 8 N. Y. Sup. 95; Grady *v.* Gosling, 48 Ohio St. 665; 29 N. E. Rep. 768; McComb *v.* Council Bluffs Ins. Co., 48 N. W. Rep. 1038.

If the proof of service is made by a private individual it may be contradicted.[1]

Defects in the return are not grounds for quashing the writ.[2]

As has been shown elsewhere it will be presumed in favor of the jurisdiction of a court of general jurisdiction that process has been properly served.[3] Therefore a want of proof of service is often immaterial. But where proof of service is made and shows an insufficient service it will not be presumed, in aid of the jurisdiction, that something different was done.[4] For this reason a defective return or affidavit of service is often worse than none at all. So a defect in the proof of service, or an entire failure to make such proof, is often supplied by a recital in the record that the defendant has been served.[5] And where a return is made of a summons, containing the names of several defendants, that a part have been served and others not found, and is silent as to the other defendants, service out of the county will not be presumed.[6]

It will be seen from what has been said that in all of the cases the return, or other proof of service, has been required to show that the statute has been fully complied with in making the service. In many of them the most literal exactness has been required, some of the cases pronouncing against the sufficiency of the return on verbal inaccuracies that seem to be too trivial and immaterial for serious consideration. In this respect some of the cases seem to go to the extreme. This results, no doubt, from the extreme care exercised by the courts to prevent an adjudication against a party without the opportunity to be heard. For this reason greater strictness, if possible, has

[1] Detroit Free Press Co. *v.* Bragg, 78 Mich. 650; 44 N. W. Rep. 149.

[2] Virginia F. & M. Ins. Co. *v.* Vaughan, 88 Va. 832; 14 S. E. Rep. 754.

[3] *Ante*, sec. 25.

[4] *Ante*, sec. 25; Godfrey *v.* Valentine, 39 Minn. 336; 40 N. W. Rep. 163.

[5] *Ante*, secs. 23, 25; *post*, sec. 40; Ford *v.* Delta, etc., Co., 43 Fed. Rep. 181.

[6] Dickison *v.* Dickison, 124 Ill. 483; 16 N. E. Rep. 861.

been shown in cases of constructive service. And out of the distinction between actual and constructive notice has grown up the doctrine, maintained in some of the cases and denied in others, that a defective and insufficient personal service will uphold a judgment against a collateral attack, or, in other words, will vest the court with jurisdiction, while, in case of constructive service, it will not; and that statutes authorizing constructive service must be strictly, and those authorizing personal service only substantially, complied with. These are distinctions that have been wholly repudiated by many of the later cases and with reason. The presumptions in favor of the jurisdiction of a court of general powers should be precisely the same whether it obtains its jurisdiction by one kind of service or another.[1]

However this may be, and it must be regarded as an open question about which the authorities wholly disagree, it must be remembered that in the cases cited in this section the questions raised as to the sufficiency of the proof of service were mainly cases in which the question arose on appeal, or where the attack was made by some other direct proceeding, and not collaterally. And no doubt, in many of the cases, if the question had been presented collaterally, the service, as shown by the proof, would have been upheld. In other words, it would have been held that the service was defective, or irregular, but not void.

The effect of defective service and the waiver of defects will be considered in another place.[2]

In case of an appeal, or other direct attack, the question is not, necessarily, whether the court had jurisdiction, but whether the court below erred in holding the return of service to be sufficient. It must be borne in mind, also, that the question as to the sufficiency of the return is not, necessarily, a jurisdictional question. A court, as we have shown, obtains jurisdiction by the *service* and not by the proof of it. In many cases, of course, the jurisdiction of the court is defeated or not upheld after it is acquired, be-

[1] *Ante*, sec. 25, p. 159.

[2] *Post*, secs. 40, 41.

cause the proof of the fact which gave it jurisdiction is not made. But if the jurisdiction actually exists it should never be allowed to fail because the formal proof of it is not sufficient, if the judgment plaintiff is able and offers to supply the necessary proof. In many of the cases, as has been shown in this section, the right to supply the necessary proof has been liberally accorded, but there are other cases in which, apparently, the service and the evidence proving or attempting to prove it are treated as one and the same thing.

40. DEFECTIVE PROCESS AND SERVICE.—This subject has been anticipated, to a great extent, in earlier sections.[1] It is not the purpose of this section to show what is defective service, as distinguished from void, or no service. That has already been done.[2] But to point out the effect of defective service.

The distinction between defective and void service is important. The former confers jurisdiction, the latter does not.[3] Defective process or service, therefore, is not subject to collateral attack, but void process or service is always open to attack, collateral or direct, unless service, or proof of it, has been waived.[4] The subject of waiver will be considered in another section.[5]

A distinction is very properly made between a defect that affects the notice of the time and place of the hearing and other defects, as, for example, an erroneous statement of the amount of the plaintiff's demand.[6]

[1] *Ante*, secs. 13, 15, 23, 25, 32, 33, 36, 37, 38, 39.

[2] *Ante*, secs. 32, 33, 36, 37, 38, 39.

[3] *Ante*, secs. 13, 22, 23, 36; Quarl *v.* Abbett, 102 Ind. 233; 1 N. E. Rep. 476; Elliott App. Pro., secs. 331, 332.

[4] *Ante*, sec. 22; *post*, sec. 41; Black on Judg., secs. 223, 224; Schneitman *v.* Noble, 75 Ia. 120; 39 N. W. Rep. 224; Baker *v.* Swift, 87 Ala. 530; 6 Sou. Rep. 153; Parker *v.* Wardner, 13 Pac. Rep. 172; Lindsay *v.* Tansley, 18 N. Y. Sup. 317; Webster *v.* Daniel, 14 S. W. Rep. 550; Byers *v.* Fowler, 12 Ark. 218; 54 Am. Dec. 271; Bank of Missouri *v.* Matson, 26 Mo. 243; 72 Am. Dec. 208; Pursley *v.* Hayes, 22 Ia. 11; 92 Am. Dec. 350.

[5] *Post*, sec. 41.

[6] Richmond & D. R. Co. *v.* Rudd, 88 Va. 648; 14 S. E. Rep. 361.

If the defect is in the proof of service, and not in the service, the proof may be amended so as to show the facts.[1] And where the defect is in the writ, and service of it has been made on the proper person, the writ may, in some cases, be amended so as to conform to the complaint, as in case of misnomer.[2] Even in case of a direct attack, for defects in the service, the objection must be made within a reasonable time, or the relief will be denied.[3]

It has been held, however, that the proof of service, where judgment has been taken by default, can not be made after an appeal has been taken.[4] This may be true, so far as the right to a reversal of the case is concerned, but the statement in the opinion in the case cited, that the "defect was jurisdictional and could not be cured," can not be maintained. As has been shown elsewhere in this work, if the service is properly made, jurisdiction at once attaches, and defective proof of the service may be amended. It is not the *proof* of service that is jurisdictional, but the service itself.[5]

In some of the cases, a distinction is made between actual and constructive service as to the effect of defective service or proof of service, it being held that, in case of constructive service, the statute must be *strictly* complied with; that nothing less than such a compliance with the statute will give the court jurisdiction, and that no presumption will be indulged in favor of the jurisdiction of the court attempted to be obtained by constructive notice. But, as we have attempted to show elsewhere, there is really no sufficient ground for such a distinction, and the later cases show a decided inclination to put actual and constructive service on the same footing in this respect.[6]

[1] *Ante*, sec. 39; Commercial Union Assur. Co. *v.* Everhart, 88 Va. 952; 14 S. E. Rep. 836; Mills *v.* Howland, 49 N. W. Rep. 413; Turner *v.* Holden, 109 N. C. 182; 13 S. E. Rep. 731; Shufeldt *v.* Barlass, 33 Neb. 785; 51 N. W. Rep. 134; Beutell *v.* Oliver, 15 S. E. Rep. 307.

[2] Gulf C. & S. F. Ry. Co. *v.* James, 48 Fed. Rep. 148.

[3] *Post*, sec. 41; Patmor *v.* Rombauer, 41 Kan. 295; 21 Pac. Rep. 284.

[4] Hall *v.* Graham, 49 Wis. 553; 5 N. W. Rep. 943.

[5] *Ante*, secs. 38, 39.

[6] *Ante*, sec. 25, p. 159; sec. 38, p. 282; Pennoyer *v.* Neff, 95 U. S. 714,

But there may be defects in constructive service that are necessarily fatal which would not be so in case of actual service. Misnomer is one of these. Actual service on a party, although by a wrong name, is such notice as must put him on inquiry, while constructive service of a like kind is no notice at all. One is defective service, the other void service.[1]

The dividing line between defective and void service can not be accurately traced or defined. The distinction is as that between *some* notice and no notice at all. If the service, whether actual or constructive, is such that a party must know from it that an action has been brought against him in a designated court, this should be held to be sufficient to put him upon inquiry as to all the other facts necessary for him to know. But, as we have seen, no such easy solution of the question can be found in the decided cases.[2]

Like most other questions affecting the subject of jurisdiction, the rules applicable to the sufficiency of the service are often, if not generally, artificial and arbitrary. Fortunately, the courts and law-makers are showing a tendency and inclination to be governed by reason, rather than by technical and arbitrary rules. The statutes in many of the states, providing, in effect, that courts must disregard defects in the pleadings or proceedings which do not affect the substantial rights of the parties, are strong indications of this tendency. But these wholesome statutory provisions seem not to be observed by the courts, as they should be, and questions of jurisdiction, involving the validity of judgments, are too often made to turn upon purely technical rules, without reference to the real merits of the controversy.

721; Applegate *v.* Lexington & Carter Co. Mining Co., 117 U. S. 255; 6 Sup. Ct. Rep. 742, 749; Stuart *v.* Anderson, 70 Tex. 588; 8 S. W. Rep. 296.

[1] *Ante*, sec. 38, p. 281; Skelton *v.* Sackett, 91 Mo. 377; 3 S. W. Rep. 874.

[2] *Ante*, sec. 36.

41. Waiver of process and service and defects therein. The question of waiver by appearance, and by failure to object to the sufficiency of process or its service at the proper time, has received attention.[1]

The general rule is that a general appearance to the action is a waiver of all defects in the service and of an entire want of service. In other words, an appearance is equivalent to actual service.[2] What will amount to such an appearance has been considered.[3]

It must be remembered, in this connection, that persons laboring under disabilities, minors, and insane persons, can not waive defects in process or service, by appearance or otherwise, nor can their guardians waive the same for them.[4]

The right of a general guardian to appear for his ward has been maintained in some cases.[5] But the great weight of authority is the other way.[6]

There are cases in which the appearance of the guardian is binding on the ward because service of process is not necessary to give jurisdiction, as in petitions for the sale of real estate or other proceedings *in rem.*, in which the filing of the petition or seizure of the property confers jurisdiction.[7]

The fact that a guardian is authorized by statute to appear and defend for his ward does not affect the question.

[1] *Ante*, secs. 13, 22, 34.

[2] *Ante*, secs. 22, 34; Pixley *v.* Winchell, 7 Cowen, 366; 17 Am. Dec. 525.

[3] *Ante*. sec. 34.

[4] *Ante*, sec. 13, p. 43; Greenman *v.* Harvey, 53 Ill. 387; Dickison *v.* Dickison, 124 Ill. 483; 16 N. E. Rep. 861; Clark *v.* Thompson, 47 Ill. 25; 95 Am. Dec. 457, 461, note; Fitch *v.* Cornell, 1 Sawyer (U. S. Cir. Ct. Rep.), 156, 171.

[5] Smith *v.* McDonald, 42 Cal. 484; Richardson *v.* Loupe, 80 Cal. 490; 22 Pac. Rep. 227.

[6] 10 Am. & Eng. Enc. of Law, 688.

[7] *Ante*, sec. 38, p. 283; Mohr *v.* Manierre, 101 U. S. 420; Scarf *v.* Aldrich, 32 Pac. Rep. 324; Gager *v.* Henry, 5 Sawyer (U. S. Cir. Ct.), 243; Robb *v.* Irwin, 15 Ohio, 689, 699; Sheldon *v.* Newton, 3 Ohio St. 494, 502.

Such authority exists only after the ward has been properly served with process.[1]

The general rule is that a court has no jurisdiction to appoint a guardian *ad litem* to appear for a minor without the service of process as required by law.[2] And if the court has no jurisdiction to appoint the guardian, certainly the person so appointed could not, by any act on his part, give the court jurisdiction to proceed further in the action.[3]

It is held, however, in some cases, that where the proceeding is in equity, and the wards are served, the appearance and answer for them by their general guardian, without the appointment of a guardian *ad litem*, is binding, although irregular, on the ground that minor defendants are the wards of the court, and, where the fact of their minority is called to the attention of the court, their rights will be protected, and they will be bound by the proceeding.[4]

There is a conflict in the authorities as to the effect of an appointment, and appearance by, a guardian *ad litem* without service on a minor. Some of the cases hold that a judgment rendered under such an appearance is only irregular and voidable, and not void.[5] But it is difficult to conceive of any principle upon which such a conclusion can be maintained. It is not a case of defective service, but of an entire want of service. The appearance is by one wholly unauthorized and in a case where the party is disabled either to waive the service himself or to authorize another person to do so for him. The court, not having acquired jurisdiction of the person of the defendant, has

[1] Dickison *v.* Dickison, 124 Ill. 483; 16 N. E. Rep. 861.

[2] Ingersoll *v.* Mangam, 84 N. Y. 622; Insurance Co. *v.* Bangs, 103 U. S. 435; Johnston *v.* S. F. Sav. Union, 63 Cal. 554; Good *v.* Norley, 28 Ia. 188, 198.

[3] Hough *v.* Canby, 8 Blkf. (Ind.) 301; Robbins *v.* Robbins, 2 Ind. 74; Abdil *v.* Abdil, 26 Ind. 287; Clark *v.* Thompson, 47 Ill. 25; 95 Am. Dec. 457, 461, note; Ingersoll *v.* Mangam, 84 N. Y. 622.

[4] Simmons *v.* Baynard, 30 Fed. Rep. 532.

[5] McAnear *v.* Epperson, 54 Tex. 220; 38 Am. Rep. 625; Wheeler *v* Ahrenbeak, 54 Tex. 535.

no power to render judgment against him. Without an appearance, or service, the judgment would undoubtedly be void. This being so, it is rather a remarkable conclusion that a court that is without jurisdiction to take any step in the case, may appoint a guardian *ad litem* without authority, and with his aid render a judgment that is merely erroneous, and which, but for the interposition of such guardian, would have been void. The better rule, so far as the reason of it is concerned, is that a judgment rendered under such circumstances is wholly void. And an examination of the authorities relied upon as supporting the doctrine that such a judgment is merely erroneous will show that they are generally founded upon the fact that the proceeding is one *in rem.*, in which the seizure of the property or a petition for its sale gives jurisdiction and not the giving of notice.[1]

The question must not be confused with that of the failure to appoint a guardian *ad litem* where there has been service, and kindred questions, which are not jurisdictional, and which do not, therefore, affect the validity of the judgment, but are mere errors and cause for direct attack.[2] Nor with the doctrine of presumption where it does not appear that service was not made on the minor defendants, or where the recitals in the record show that service was made. In such cases, minors stand upon the same footing as adults, and may be barred from attacking the judgment collaterally.[3] Nor with those cases above referred to, which are not adversary in their nature, and in which the filing of the necessary petition gives jurisdiction. In such cases, while notice is required by statute, the giving of such notice is not necessary to give ju-

[1] *Ante*, sec. 14, p. 49; sec. 38, p. 283; McAnear *v.* Epperson, 54 Tex. 220; 38 Am. Rep. 625; Mohr *v.* Manierre, 101 U. S. 420; Scarf *v.* Aldrich, 32 Pac. Rep. 324; Robb *v.* Irwin, 15 Ohio, 689, 699; Sheldon *v.* Newton, 3 Ohio St. 494, 502; Good *v.* Norley, 28 Ia. 188, 193.

[2] Porter *v.* Robinson, 3 A. K. Marshall, 253; 13 Am. Dec. 153, 159, note.

[3] *Ante*, secs. 22, 25.

risdiction, and the failure to give it is but an irregularity not affecting the validity of the judgment.[1]

There is a diversity of opinion upon the question whether an application by an administrator or guardian is a proceeding *in rem.*, within the rule that notice is not necessary to give jurisdiction, but only to make it effectual.[2]

An attorney can not waive service upon a minor.[3]

The receipt of the benefits of a judgment rendered upon defective service is a waiver of such defect, but not where the judgment is void because of an entire want of notice.[4]

An agreement made beforehand to waive the return of service at the required time has been held to be insufficient to give the court jurisdiction.[5]

A party summoned by a wrong name, who appears and allows judgment to be taken against him by his true name, can not afterward contest the judgment because of the defective service.[6]

The rule is the same where the judgment is taken against a corporation or an individual by the wrong name, under which service is made.[7]

By setting up certain objections to defective service, other objections not made are waived.[8]

If the service is defective, merely, and not void, a failure to appear and object is a waiver, and the entry of judgment, after default, can not be resisted on that ground.[9] And the failure to attack a judgment, for an unreasonable

[1] Sheldon *v.* Newton, 3 Ohio St. 494, 502.

[2] See the authorities cited on both sides of the proposition in the case of Good *v.* Norley, 28 Ia. 188, in which the court was equally divided and the authorities cited much the same.

[3] Bonnell *v.* Holt, 89 Ill. 71; Valentine *v.* Cooley, Meigs (Tenn.), 613; 33 Am. Dec. 166.

[4] Gay *v.* Grant, 101 N. C. 206; 8 S. E. Rep. 99.

[5] Brown *v.* Carroll, 16 R. I. 604; 18 Atl. Rep. 283.

[6] Williams *v.* Hitzie, 83 Ind. 303.

[7] Young *v.* South Tredegar Iron Co., 1 Pickle (Tenn.), 189; 2 S. W. Rep. 202.

[8] Feibleman *v.* Esmonds, 69 Tex. 334; 6 S. W. Rep. 417.

[9] Nashua Sav. Bank *v.* Lovejoy, 46 N. W. Rep. 411.

time, where the service is defective, will sometimes bar the right to have it set aside.[1]

In many of the states, the time within which a defective service of process may be attacked by a direct proceeding is limited. Under such statutes a failure to question the service within the time limited is a waiver of the right.[2] But a party may be relieved, after the time, on the ground of fraud in obtaining the service where the notice is constructive.[3]

The right to set aside a judgment on the ground that it was fraudulently obtained may, however, be barred by the statute of limitations.[4]

An acceptance of service of a defective summons, if it gives notice of the time and place of appearance, will waive the defects.[5] But it is sometimes provided that no such acceptance or waiver shall be made before the suit is brought, and under such a statute an acceptance or waiver of service before suit brought will not support a judgment by default.[6]

A statement by a defendant, to the officer who holds the process for service, that he waives the service of the same, the party not being within the jurisdiction of the court, is not a waiver and does not confer jurisdiction.[7]

Authority given an agent to acknowledge service gives him no authority to waive it.[8] But an unauthorized acceptance or waiver of service by an agent may be subsequently ratified.[9]

A waiver, without appearance, must be by some formal

[1] Martin *v.* Gray, 142 U. S. 286; 12 Sup. Ct. Rep. 186; Patmor *v.* Rombauer, 41 Kan. 295; 21 Pac. Rep. 284.

[2] *Ante*, sec. 22, pp. 111, 115.

[3] *Ante*, sec. 22, p. 115; Dunlap *v.* Steere, 92 Cal. 344; 28 Pac. Rep. 563.

[4] Hefferman *v.* Howell, 90 Mo. 344; 2 S. W. Rep. 470.

[5] Gay *v.* Grant, 101 N. C. 206; 8 S. E. Rep. 99.

[6] McAnelly *v.* Ward, 72 Tex. 342; 12 S. W. Rep. 206.

[7] Wade *v.* Wisenant, 86 Ga. 482; 12 S. E. Rep. 645; Godwin *v.* Monds, 106 N. C. 448; 10 S. E. Rep. 1044.

[8] Clark *v.* Morrison, 85 Ga. 229; 11 S. E. Rep. 614.

[9] Clark *v.* Morrison, 80 Ga. 393; 6 S. E. Rep. 171.

renunciation of the service.[1] This may be done by a written waiver indorsed on the writ or complaint.[2]

The right to be sued in the county or district of one's residence, and to have process served there, is one that may be waived. This may be done in other ways than by an appearance. Thus, it has been held that where the statute of a state authorizes foreign corporations to do business therein on condition that they submit to be sued in the courts of the state, a corporation, by doing business in the sate, waives its right to contest the service of summons therein on the ground that it is a non-resident.[3]

By appearing in a suit on a judgment, and contesting the same on the ground that there was no sufficient service upon him, a judgment defendant does not waive his right to maintain a writ of error to reverse the same.[4]

42. Of new parties and amended pleadings. As a general rule, where new parties defendant are made, pending the action, jurisdiction over their persons must be obtained in the same way that would have been necessary if they had been made parties in the beginning.[5]

If the defendants have appeared and new parties plaintiff have been made by amendment, no new process need issue. It is enough to serve upon them or their attorneys copies of the amended pleadings. But this can not be done where there has been no appearance.[6]

So where the proceeding is one in a court of equity auxiliary to an action already pending, and in which the parties have been served, subpena may be served on their attorneys.[7] And in some of the states where, under the

[1] Collier *v.* Morgan's L. & T. R. Co., 41 La. Ann. 37; 5 Sou. Rep. 537.

[2] *Ante*, sec. 39; Carter *v.* Penn, 79 Ga. 747; 4 S. E. Rep. 896.

[3] *Post*, sec. 43; United States *v.* American Bell Tel. Co., 29 Fed. Rep. 17, 35.

[4] Eliot *v.* McCormick, 144 Mass. 10; 10 N. E. Rep. 705, 710.

[5] Plemmons *v.* Southern Imp. Co., 108 N. C. 614; 13 S. E. Rep. 188.

[6] Powers *v.* Braly, 75 Cal. 237; 17 Pac. Rep. 197.

[7] *Ante*, sec. 38, p. 271; Abraham *v.* North Ger. F. Ins. Co., 37 Fed. Rep. 731.

practice, all pleadings are filed in open court, in term time, no service of copies on the opposite side is necessary. Parties, being in court, must take notice of all pleadings filed.

If the original defendants have been served, but have not appeared, a different question arises. If the amendment of the complaint consists only in making new parties without in any way changing the cause of action as against the original defendants, or the amendment is merely formal and a failure to give additional notice could work no injury, the service of a new summons is unnecessary.[1] But where the amendment changes the cause of action against the original defendants, who have not appeared, whether new parties are brought in or not, a new summons or publication against them is necessary. The summons served upon them, personally, or by constructive service, gives the court jurisdiction to render judgment against them in accordance with the complaint on file when service was made, and the notice given; and gives no authority to render judgment upon a materially different cause of action shown by an amended pleading subsequently filed.[2] If notice by publication or otherwise is partially made, when the original defendant dies, a new notice is necessary, as against his heirs or representatives when substituted.[3]

In the absence of a showing to the contrary, it will be presumed, after a long lapse of time, that the parties were summoned to answer an amended complaint.[4] And, independent of the length of time that has intervened, the same presumptions in favor of the jurisdiction of the court will prevail as in other cases, where the record is silent and the attack is collateral.[5]

No new proces is necessary where an additional or substi-

[1] Bray *v.* Creekmore, 109 N. C. 49; 13 S. E. Rep. 723.

[2] *Ante*, sec. 14, p. 49; Stuart *v.* Anderson, 70 Tex. 588; 8 S. W. Rep. 295.

[3] *Ante*, sec. 38, p. 284; Paget *v.* Pease, 2 N. Y. Sup. 335; Reilly *v.* Hart, 8 N. Y. Sup. 717; Reilly *v.* Hart, 130 N. Y. 625; 29 N. E. Rep. 1099.

[4] Best *v.* Van Hook, 13 S. W. Rep. 119.

[5] *Ante*, sec. 25; Crim *v.* Kessing, 89 Cal. 478; 26 Pac. Rep. 1074.

tuted plaintiff is brought in because he becomes a party voluntarily, and appears in the action by the very act of making the amendment, and the defendant is already before the court.[1] The rule is the same where the complaint is amended by striking out the name of a plaintiff.[2] In some cases where an action is allowed to be continued against the representatives or successors in interest of a defendant upon his death, it is held that a summons need not issue, but a service of the order of continuance on the new parties, with a notice to appear, is sufficient.[3] But the general and better rule is that summons must issue and be served. A somewhat different rule prevails where the cause is pending on writ of error or appeal, and the death of a party to the appeal occurs. At common law the death of the plaintiff in error, after errors assigned, or of the defendant in error, before or after the assignment of errors, did not abate the writ.[4] The proceeding necessary to be taken where the death occurs at this stage of the proceedings, is usually provided by statute in the several states. But the general rule is that a decision, after the death of a party, relates back to the date of the proceeding in error, and that no substitution or notice to his representatives is necessary. If the cause is reversed, and a new trial ordered, the revivor, substitution, and notice to the new parties must take place in the court below.[5] But the appellate court may, in its discretion, permit a substitution of the representatives of a deceased party in that court.[6] It has been held that where a party is joined in an action to foreclose a mortgage, as the wife of the mortgagee and owner, who has not appeared, and upon the death of the latter, a supplemental complaint is filed alleging her to be

[1] Plemmons *v.* Southern Improvement Co., 108 N. C. 614; 13 S. E. Rep. 188.

[2] Jarrett *v.* Gibbs, 107 N. C. 303; Murphy *v.* Gibbs, 12 S. E. Rep. 272; Reynolds *v.* Smathers, 87 N. C. 24.

[3] Lyles *v.* Haskell, 35 S. C. 391; 14 S. E. Rep. 829.

[4] Black *v.* Hill, 29 Ohio St. 86.

[5] Williams *v.* Englebrecht, 38 Ohio St. 96; Prior *v.* Kiso, 96 Mo. 303; 9 S. W. Rep. 898.

[6] Black *v.* Hill, 29 Ohio St. 86; Foresman *v.* Haag, 37 Ohio St. 143.

an owner, as heir of her husband, a new summons must issue, although she had appeared and answered the original complaint.[1] But this proposition may well be doubted. There seems to be no sound reason for holding that a party served with summons and in court should be entitled to be served with summons upon a supplemental complaint, where such summons would not be necessary in case of an amendment to a complaint changing the cause of action.[2]

43. In actions against corporations.—The manner of making service on corporations, and the place where service may be made, differs very materially, in some respects, from service on private persons, as the result of statutory enactments providing for and regulating such service. Perhaps the most important of these differences is the one which allows service to be made on agents of foreign corporations, and compels such corporations to submit to the jurisdiction of foreign courts. In many of the states a submission to the jurisdiction of its courts, by foreign corporations, is compelled by a statutory provision allowing them to carry on business within the state only on condition that service of process shall be had on their agents or some one appointed for that purpose within the state, and that the trial of litigated questions shall be had in the state courts. The constitutionality of these and similar statutory provisions has been vigorously assailed by the corporations, but the right of the state to impose such conditions has been very uniformly sustained, and the legality of such statutes upheld.[3] But the conditions imposed must not be unreasonable, or such as to deprive the

[1] Martin *v.* Noble, 29 Ind. 216.

[2] 1 Work's Prac. and Plead., sec. 209. It may be well to notice, in this connection, that under the practice in Indiana, the service of a copy of any pleading on the opposite party is not necessary. The same is required to be filed and the defendant, if he has been served and appeared, must take notice of it.

[3] Paul *v.* Virginia, 8 Wall. 168; St. Clair *v.* Cox, 106 U. S. 350; 1 Sup. Ct. Rep. 354; Lafayette Ins. Co. *v.* French, 18 How. 404; Doyle *v.* Continental Ins. Co., 94 U. S. 535; Van Dresser *v.* Oregon Ry. and Nav. Co.,

corporation of the opportunity to be heard before being condemned, or inconsistent with those rules of public law which secure the jurisdiction and authority of each state from encroachments by all others.[1] It must be remembered, also, that the right to sue and serve a corporation in a state, other than that of its creation, is wholly dependent upon statutory authority of the state in which such service is made.[2] And upon the fact, also, that the corporation was, at the time suit was brought, doing business in the state.[3]

But the right to sue a corporation in a foreign state is not confined to actions growing out of the business done by it in such state. By entering the state it becomes liable to service in all suits that might properly be brought in such state if it were created by and under its laws. Therefore, in purely transitory actions arising in another state, the corporation may be sued and served in the state

48 Fed. Rep. 202; Shafer Iron Co. *v.* Iron Circuit Judge, 88 Mich. 464; 50 N. W. Rep. 389.

[1] St. Clair *v.* Cox, 106 U. S. 350; 1 Sup. Ct. Rep. 354, 359; Lafayette Ins. Co. *v.* French, 18 How. 404; Doyle *v.* Continental Ins. Co., 94 U. S. 535.

[2] St. Clair *v.* Cox, 106 U. S. 350; 1 Sup. Ct. Rep. 354; United States *v.* American Bell Tel. Co., 29 Fed. Rep. 17, 35; Maxwell *v.* Atchison, T. & S. F. R. Co., 34 Fed. Rep. 286.

[3] St. Clair *v.* Cox, 106 U. S. 350; 1 Sup. Ct. Rep. 354; United States *v.* American Bell Tel. Co. 29 Fed. Rep. 17, 35; Phillips *v.* Burlington Library Co., 141 Pa. St. 462; 21 Atl. Rep. 640; Camden Rolling Mill Co. *v.* Swede Iron Co., 32 N. J. L. 15. In the case of United States *v.* American Bell Tel. Co., 29 Fed. Rep. 35, it was said: "In the absence of a voluntary appearance, three conditions must concur or co-exist in order to give the federal courts jurisdiction *in personam* over a corporation created without the territorial limits of the state in which the court is held, viz: 1. It must appear, as a matter of fact, that the corporation is carrying on its business in such foreign state or district. 2. That such business is transacted or managed by some agent or officer appointed by and representing the corporation in such state; and 3. The existence of some local law, making such corporation, or foreign corporations generally, amenable to suit there as a condition, express or implied, of doing business in the state."

This applies in terms to federal courts, but it is equally applicable to state courts.

in which it is doing business.[1] But such conditions or restrictions can not be imposed upon corporations operating under the inter-state commerce law enacted by congress.[2]

A corporation is not a citizen within the meaning of the constitutional provision which declares that the citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states.[3] And, there-

[1] Phillips *v.* Burlington Library Co., 141 Pa. St. 462; 21 Atl. Rep. 640.

[2] United States *v.* American Bell Tel. Co., 29 Fed. Rep. 17, 35.

[3] "On the trial in the court below, the validity of the discriminating provisions of the statute of Virginia between her own corporations and corporations of other states was assailed. It was contended that the statute in this particular was in conflict with that clause of the constitution which declares that 'the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states,' and the clause which declares that congress shall have power 'to regulate commerce with foreign nations and among the several states.' The same grounds are urged in this court for the reversal of the judgment. The answer which readily occurs to the objection founded upon the first clause consists in the fact that corporations are not citizens within its meaning. The term 'citizens' as there used applies only to natural persons, members of the body politic, owing allegiance to the state, not to artificial persons created by the legislature, and possessing only the attributes which the legislature has prescribed. It is true that it has been held that, where contracts or rights of property are to be enforced by or against corporations, the courts of the United States will, for the purpose of maintaining jurisdiction, consider the corporation as representing citizens of the state under the laws of which it is created, and to this extent will treat a corporation as a citizen within the clause of the constitution extending the judicial power of the United States to controversies between citizens of different states. In the early cases when this question of the right of corporations to litigate in the courts of the United States was considered, it was held that the right depended upon the citizenship of the members of the corporation, and its proper averment in the pleadings. Thus, in the case of Hope Ins. Co. *v.* Boardman, 5 Cranch, 57, where the company was described in the declaration as 'a company legally incorporated by the legislature of the State of Rhode Island and Providence Plantations, and established at Providence,' the judgment was reversed because there was no averment that the members of the corporation were citizens of Rhode Island, the court holding that an aggregate corporation as such was not a citizen within the meaning of the constitution.

"In later cases this ruling was modified, and it was held that the members of a corporation would be presumed to be citizens of the state in which the corporation was created, and where alone it had any legal existence, without any special averment of such citizenship, the aver-

fore, as to corporations not controlled or protected by inter-state commerce laws, a state may impose such conditions as it sees proper upon which such a corporation shall be permitted to do business within the state.[1] And whether controlled by inter-state laws or not, a corporation may be compelled to submit to service of process within a state other than that of its creation, but it can not be denied the right to do business within the state to compel its submission to the jurisdiction of the courts of such state.

The right to a trial within the county, state, or district of one's residence, is a personal privilege that may be waived.[2] Therefore, if a corporation does business in a state where a condition of doing business imposed by statute is that such corporation shall submit to be sued in the courts of the state, by doing business in the state, it waives its right to be sued in the place of its residence.[3] And it is not necessary that the condition be expressed in terms in the statute. Where the provision authorizing service on foreign corporations doing business and acting through its officers or agents within the state exists, there is an implied condition that it shall submit to the jurisdiction of the courts of the state, upon such service, while operating within the state.[4]

But independent of some statute imposing such a con-

ment of the place of creation and business of the corporation being sufficient; and that such presumption could not be controverted for the purpose of defeating the jurisdiction of the court. Louisville R. R. Co. *v.* Letson, 2 How. 497; Marshall *v.* Balt. & O. R. R. Co., 16 How. 314; Covington Drawbridge Co. *v.* Shepherd, 20 How. 233 (61 U. S., XV., 898); Ohio & Miss. R. R. Co. *v.* Wheeler, 1 Black, 297 (66 U. S., XVII, 133).

"But in no case which has come under our observation, either in the state or federal courts, has a corporation been considered a citizen within the meaning of that provision of the constitution which declares that the citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states." Paul *v.* Virginia, 8 Wall. 168.

[1] Ex parte Schollenberger, 96 U. S. 369.

[2] *Ante*, sec. 41; United States *v.* American Bell Tel. Co., 29 Fed. Rep. 17.

[3] *Ante*, sec. 41; United States *v.* American Bell Tel. Co., 29 Fed. Rep. 17; Railroad Co. *v.* Koontz, 104 U. S. 5, 10.

[4] United States *v.* American Bell Tel. Co., 29 Fed. Rep. 17, 35.

dition, express or implied, or some similar provision, by which a corporation is subjected to suit outside of the state or sovereignty creating it, the corporation can not be found for the purposes of suit *in personam* outside of such territory.[1]

[1] In United States *v.* American Bell Tel. Co., 29 Fed. Rep. 34, the court said:

"For the complainants it is insisted that under the judiciary acts (Rev. Stat., sec. 739) and the act of March 3, 1875, a corporation is to be found and is amenable to suit wherever it is doing business, independently of the existence of any local law providing for suits against it; that the mere fact of carrying on its business in a state other than that of its creation will enable it to be found there, irrespective of any law or statute of such state authorizing suit against it, or against foreign corporations generally, by service upon their agent. No case yet decided by the supreme court, either directly or in principle, sustains this broad proposition. The supreme court has not yet gone to the extent of holding that a corporation can be found, under the judiciary acts, for personal suit, beyond the limits of the state creating or adopting it *eo nomine*, irrespective of the local law. In every decision of the supreme court, asserting or maintaining the jurisdiction of either the federal or state courts over corporations created or located outside of the territorial limits of the state or district in which suit was brought against them, commencing with Lafayette Ins. Co. *v.* French, 18 How. 404, which made the first exception to the rule of the common law that a corporation could not migrate, had no legal existence, and could not be found, for the purpose of suit, beyond the limits of the sovereignty creating it, there has existed a local statute expressly or impliedly providing for or authorizing such suit as a condition of the corporations doing business therein, together with the further fact that the foreign corporation actually carried on its business, or some substantial part thereof, in such state by and through the instrumentality of agents appointed by itself. Except where the law of the state in which it carries on business and is sued, imposes, expressly or by implication, a liability to suit there as a condition of its doing business in the state, a foreign corporation can not be found, for the purpose of a suit *in personam*, outside of the jurisdiction or sovereignty creating it. Without undertaking to review the authorities on the subject of a corporation's liability to suit in a state or district other than that of its creation, we think the decisions of the supreme court have settled and established the proposition that, in the absence of a voluntary appearance, three conditions must concur or coexist in order to give the federal courts jurisdiction *in personam* over a corporation created without the territorial limits of the state in which the court is held, viz.: (1) It must appear as a matter of fact that the corporation is carrying on its business in such foreign state or district; (2) that such business is transacted or managed by some agent or officer

The statutes authorizing service on persons acting for or representing the corporation differ somewhat, but the general principles affecting all of them are substantially the same. In most of them, service is authorized to be made on some officer or officers or general agent or manager of the corporation.[1] And in the absence of any officer or agent, service is sometimes authorized to be made on a stockholder of the corporation.[1] Some of the statutes go much further, and authorize service on any person in the employ of, or having in charge property of, the corporation.[2] In others, the right to serve on an officer or agent is allowed only when the corporation has property within the state or the cause of action arose therein.[3] And in others, provision is made requiring the corporation to designate some person upon whom service may be made.[4] The appointment of such person

appointed by and representing the corporation in such state; and (3) the existence of some local law making such corporation, or foreign corporations generally, amenable to suit there as a condition, express or implied, of doing business in the state. When the local law, expressly or by comity, permits foreign corporations to do business in the state; when it also provides for suit against them in a reasonable and proper manner, and within the just limits of the state's power and authority; and when a foreign corporation thereafter enters the state, and transacts its corporate business by means of resident agents coming within the terms of the local statute, it may be *found*, and is liable to suit there in either the state or federal courts, by service of process on such agent. Lafayette Ins. Co. *v.* French, 18 How. 404; Railroad Co. *v.* Harris, 12 Wall. 65; Ex parte Schollenberger, 96 U. S. 369; Railroad Co. *v.* Koontz, 104 U. S. 5; St. Clair *v.* Cox, 106 U. S. 350; S. C., 1 Sup. Ct. Rep. 354; New England Mut. Life Ins. Co. *v.* Woodworth, 111 U. S. 138; S. C., 4 Sup. Ct. Rep. 364; Boston Electric Co. *v.* Electric Gas-Lighting Co., 23 Fed. Rep. 839. The underlying principle on which these decisions rest is that the state may impose conditions, not in conflict with the laws and constitution of the United States, on the transaction of business in its territory by corporations chartered elsewhere, or exclude them altogether, or revoke permission or license already given." Carpenter *v.* Westinghouse Air Brake Co., 32 Fed. Rep. 434.

[1] Comet Consolidated Min. Co. *v.* Frost, 15 Colo. 310; 25 Pac. Rep. 506.

[2] Saunders *v.* Sioux City Nursery Co., 6 Utah, 431; 24 Pac. Rep. 532.

[3] Hester *v.* Rasin Fertilizer Co., 33 S. Car. 609; 12 S. E. Rep. 563.

[4] Colorado Iron Works *v.* Sierra Min. Co., 15 Colo. 499; 25 Pac. Rep. 325; Ex parte Schollenberger, 96 U. S. 369; Gibson *v.* Manufacturers F. & M. Ins. Co., 144 Mass. 81; 10 N. E. Rep. 729.

is irrevocable so long as the corporation continues to do business in the state, except where some one else is designated upon whom to make service.[1] And if no person is so designated, service is sometimes authorized to be made on some officer of the state or other person designated in the statute.

A person designated by a corporation as one upon whom service may be made has no power to waive service.[2]

Sometime the right of service is confined to persons employed in the agency in or through which the business resulting in the litigation was transacted. Under such statute, service can not be made on another agent, or his employee, not connected with the transaction in litigation.[3]

Where provision is made for service on one officer or agent only where another officer or agent can not be found, a service on the former is good only where the latter can not be found, and the proof of service must show the fact.[4] But if service on either of several named officers is authorized, without giving precedence to any, service on any one of them is sufficient.[5] And a defect in serving the summons on the wrong officer is waived by a general appearance in the action.[6]

Where service on a particular officer of a municipal corporation is required, and such officer has resigned, service can not, for that reason, be made on any other officer of the corporation.[7]

[1] Gibson *v.* Manufacturers F. & M. Ins. Co., 144 Mass. 81; 10 N. E. Rep. 729.

[2] Farmer *v.* National Life Ass'n, 50 Fed. Rep. 829.

[3] State Ins. Co. *v.* Granger, 62 Ia. 272; 17 N. W. Rep. 504; Winney *v.* Sandwich Mf'g Co., 50 N. W. Rep. 565.

[4] *Ante*, secs. 37, 39, pp. 263, 265.

[5] Comet Consolidated Min. Co. *v.* Frost. 15 Colo. 310; 25 Pac. Rep. 506.

[6] *Ante*, secs. 13, 34; Dugan *v.* Mayor, etc., 70 Mich. 1; 16 Atl. Rep. 501.

[7] "The question, then, is reduced to this: Whether, in case the mayor has resigned, and there is no presiding officer of the board of street commissioners (a body which seems to take the place of the common council of the city for many purposes), service of process on the city clerk, and on a conspicuous member of the board, is sufficient. If the common

At common law, the rule would be different. The court could designate some person on whom service might be made. But where the person upon whom service may

law (which is common reason in matters of justice) were permitted to prevail, there would be no difficulty. In the absence of any head officer, the court could direct service to be made on such official persons as it might deem sufficient. But when a statute intervenes, and displaces the common law, we are brought to a question of words, and are bound to take the words of the statute as law. The cases are numerous which decide that where a particular method of serving process is pointed out by statute, that method must be followed, and the rule is especially exacting in reference to corporations. Kibbe *v.* Benson, 17 Wall. 624; Alexandria *v.* Fairfax, 95 U. S. 774; Settlemier *v.* Sullivan, 97 U. S. 444; Evans *v.* Railway Co., 14 Mees. & W. 142; Walton *v.* Salvage Co., 16 Mees. & W. 438; Brydolf *v.* Wolf, 32 Iowa, 509; Hoen *v.* Railroad Co., 64 Mo. 561; Insurance Co. *v.* Fuller, 81 Pa. St. 398. The courts of Wisconsin strictly adhere to this rule. Congar *v.* Railroad Co., 17 Wis. 478, 485; City of Watertonw *v.* Robinson, 59 Wis. 513; 17 N. W. Rep. 542; City of Watertown *v.* Robinson, 69 Wis. 230; 34 N. W. Rep. 139. The two cases last cited related to the charter now under consideration. In the first case, service was made upon the city clerk and upon the chairman of the board of street commissioners while the board was in session, in the absence of the mayor, who could not be found after diligent search. The court, after referring to the provisions of the charter and the revised statute on the subject, say: 'The question whether the revised statutes control as to the manner of service is not a material inquiry here, because both the charter and general provision require the services to be made upon the mayor, but no service was made upon that officer, as appeared by the return of the sheriff. The principle is too elementary to need discussion, that a court can only acquire jurisdiction of a party, where there is no appearance, by the service of process in the manner prescribed by law.' In the last case (decided in 1887), service was made in the same manner as in the previous one, and the court say: 'When the statute prescribes a particular mode of service, that mode must be followed *ita lex scripta est*. There is no chance to speculate whether some other mode will not answer as well. . . . This has been too often held by this court to require further citations. . . . When a statute designates a particular officer to whom the process may be delivered, and with whom it may be left, as service upon the corporation, no other officer or person can be substituted in his place. . . . The designation of one particular officer upon whom service may be made excludes all others. . . . The temporary inconvenience arising from a vacancy in the office of mayor affords no good reason for a substitution of some other officer in his place, upon whom service could be made, by unwarrantable construction not contemplated by the statute.' It is unnecessary to look further to see what the law of Wisconsin is on this subject. It is perfectly clear that, by that law, the service

or must be made is provided by statute, the designation of the person excludes the right to serve on any other person, by order of the court or otherwise.[1]

Where upon a vacancy in one office another designated officer is vested with the powers and duties of the office vacated, service may be made upon the officer thus performing the duties, although service on him would otherwise be insufficient.[2] But a vacancy in the office will not be presumed from a return that the officer is not found.

As the manner of service provided by statutes of the kind under consideration, is exceptional, the provisions of the statute must be strictly complied with.[4] Therefore, although service on an officer or agent, not authorized by the statute, would be just as efficacious as the one mentioned therein, such service will not confer jurisdiction.[5]

The term station agent means the agent locally in charge of the station or depot of a railroad company, and who has general charge at the place where he acts, and a return of service on a "commercial agent" is insufficient where service is authorized to be made on "any station agent or ticket agent."[4]

The return of the officer to the effect that service was made on the required officer, or agent, is not conclusive as to the fact of the person served being such officer or agent. Whether the person served was such officer or agent, is a question of fact to be determined by the court.[6]

Where service is required to be made on two officers of

of process in the present case was ineffective and void." Amy *v.* City of Watertown, 130 U. S. 301; 9 Sup. Ct. Rep. 530, 535.

[1] Amy *v.* City of Watertown, 130 U. S. 301; 9 Sup. Ct. Rep. 530.

[2] Worts *v.* City of Watertown, 16 Fed. Rep. 534.

[3] City of Watertown *v.* Robinson, 59 Wis. 513; 17 N. W. Rep. 542.

[4] City of Detroit *v.* Wabash & St. L. & P. Ry. Co., 63 Mich. 712; 30 N. W. Rep. 321.

[5] City of Detroit *v.* Wabash & St. L. & P. Ry. Co., 63 Mich. 712; 30 N. W. Rep. 321; O'Brien *v.* Shaws Flat, etc., Co., 10 Cal. 343; Great West Min. Co. *v.* Woodmas, 12 Col. 46; 20 Pac. Rep. 771.

[6] Hester *v.* Rasin Fertilizer Co., 33 S. Car. 609; 12 S. E. Rep. 563; Forrest *v.* Union Pac. R. Co., 47 Fed. Rep. 1; *ante*, sec. 22, p. 116.

a corporation, a service on one of them, only, confers no jurisdiction.[1]

The question frequently arises in the decided cases as to the meaning of the terms "general agent" or "managing agent" as used in many of the statutes. It is not a question that can be determined by any fixed definition, or rule, applicable to all cases. Each case must depend very materially upon the character of the business carried on by the corporation and the nature of the work to be done, or business to be transacted, by the agent. In some of the cases, the question is made to turn upon the well known difference between a general and special agent where the service is required to be made on a general agent.[2]

The authorities are pretty well agreed that whether the term agent, simply, or general agent, or managing agent, is used, service can not be had on every employee who is, in a certain sense, an agent of the corporation. It must be upon some one having the management or control of the business of the corporation, or some department or branch of its business.[3] And, where the term general or managing agent is used, the person served must be one having a general supervision over the affairs of the corporation, or some department of its business, within the department or in the district or county where the service is made; one invested with general power involving the exercise of judgment and discretion.[4]

[1] Mariner *v.* Town of Waterloo, 75 Wis. 438; 44 N. W. Rep. 512.

[2] Great West Mining Co. *v.* Woodmas, etc., Mining Co., 12 Colo. 46; 20 Pac. Rep. 771.

[3] Kennedy *v.* The Hibernian Sav. & Loan So., 38 Cal. 151; Upper Mississippi Trans. Co. *v.* Whitaker, 16 Wis. 220; Chambers *v.* Bridge Manufactory, 16 Kan. 270; Maxwell v. Atchison, T. & S. F. R. Co., 34 Fed. Rep. 286.

[4] Reddington *v.* Mariposa L. & M. Co., 26 Hun, 405; Upper Mississippi Trans. Co. *v.* Whitaker, 16 Wis. 220; State Ins. Co. *v.* Waterhouse, 78 Ia. 674: 43 N. W. Rep. 611; Winslow *v.* Staten Island, etc., Co., 4 N. Y. Sup. 169; Barrett *v.* American Tel. & Tel. Co., 10 N. Y. Sup. 138; Tuchband *v.* Chicago & A. R. Co., 115 N. Y. 437; 22 N. E. Rep. 360; Ruland *v.* Canfield Pub. Co., 10 N. Y. Sup. 913.

It is not necessary that the person served should be known and designated as managing agent, if his duties constitute him such an agent. Therefore, service on a general superintendent has been held to be sufficient under a statute requiring service to be made on a managing agent.[1]

It is not always necessary that the officer served shall be at the head of the department he represents. He may be a superintendent, although subject to the orders of a superior officer belonging to his department.[2]

As to what will constitute an agent, or other representative of a corporation upon whom service may be made, see further the authorities cited in the note.[3]

The service must be made on the person holding the office designated, although some one else may be performing the duties of the office. Service on the latter is not sufficient.[4]

Nor can service required to be made on an officer be made on an assistant known and designated as such assistant officer and performing the duties of the office, even when the officer is a non-resident.[5]

It is held that, as a foreign corporation has no place of residence within the state in which it is doing business, it may be sued in any county in the state without reference to its principal place of business within the state.[6]

The general rule is that the power of an officer of a municipal corporation, to bind it by his acts, is con-

[1] Barrett *v.* American Tel. & Tel. Co., 10 N. Y. Sup. 138.

[2] St. Louis & S. F. Ry. Co. *v.* Deford, 38 Kan. 299; 16 Pac. Rep. 442.

[3] Gottschalk Co. *v.* Distilling, etc., Co., 50 Fed. Rep. 681; St. Clair *v.* Cox, 106 U. S. 359; 1 Sup. Ct. Rep. 354; Burgess *v.* C. Aultman & Co., 80 Wis. 292; 50 N. W. Rep. 175; Shafer Iron Co. *v.* Iron Circuit Judge, 88 Mich. 464; 50 N. W. Rep. 389; Philip *v.* Covenant Mut., etc., Ass'n, 62 Ia. 633; 17 N. W. Rep. 903; Kansas City, etc., R. Co. *v.* Daughtry, 138 U. S. 298; 11 Sup. Ct. Rep. 306; Southern Ins. Co. *v.* Wolverton Hardware Co., 19 S. W. Rep. 615; Berlin Iron Bridge Co. *v.* Norton, 17 Atl. Rep. 1079; Mulhearn *v.* Press Pub. Co., 53 N. J. L. 150; 20 Atl. Rep. 760; McCulloh *v.* Paillard, etc., Co., 14 N. Y. Sup. 491.

[4] Chambers *v.* Bridge Manufactory, 16 Kan. 270, 276.

[5] Winslow *v.* Staten Island, etc., Co., 4 N. Y. Sup. 169.

[6] Thomas *v.* Placerville G. Q. M. Co., 65 Cal. 600; 4 Pac. Rep. 641.

fined to and can not be exercised beyond the territorial limits of the corporation, and that such officer is not, therefore, an agent of the corporation elsewhere, and can not be served with process, as such agent, outside of the county in which such corporation is situated.[1] And, in order to render service on an officer of a private corporation, in a foreign state, sufficient, he must, at the time, be acting in his representative capacity. If he is in the state on business not connected with the corporation he represents, when at home, the service is not binding.[2] But this rule is guarded against in some of the states by an express statutory provision authorizing service on any officer or agent within the state, whether there on the business of the corporation or not.[3]

Of course it is not always necessary to serve on an officer or agent. Service is sometimes authorized by statute to be made on a mere clerk. If the statute provides for it, such a service is sufficient. But where service upon a clerk of a particular agency, or in a certain place, is required, the party served must, so far as such statute is concerned, come within its requirements.[4]

The rule as to the necessity of a compliance with the statute in making service is the same whether the corporation is a foreign or a domestic corporation.[5]

A question sometimes arises as to what will amount to a doing business within a state sufficient to bring a foreign corporation within these statutes. It would seem to be necessary that the corporation enter, regularly, into business of some kind, and that a single act of purchase within a state or a single contract not in the line of its own business, but in the way of purchase for its own use, would

[1] Pack *v.* Greenbush Tp., 62 Mich. 122; 28 N. W. Rep. 746.

[2] Newell *v.* Great Western Ry. Co., 19 Mich. 336; St. Clair *v.* Cox, 106 U. S. 350; 1 Sup. Ct. Rep. 354; Golden *v.* The Morning News, 42 Fed. Rep. 112; Bentliff *v.* London, etc., Co., 44 Fed. Rep. 667; Reifsnider *v.* American Imp. Pub. Co., 45 Fed. Rep. 433.

[3] Shafer Iron Co. *v.* Iron Circuit Judge, 88 Mich. 464; 50 N. W. Rep. 389.

[4] State Ins. Co. *v.* Waterhouse, 78 Ia. 674; 43 N. W. Rep. 611.

[5] Ruland *v.* Canfield Pub. Co., 10 N. Y. Sup. 913.

not bring it within the statute.[1] But if the contract entered into, or business done, is such as the corporation is authorized to carry on as a part of its regular business, no matter whether the business done consists of one transaction or many, the statute must apply. For example, if a corporation, chartered for the purpose of carrying on an insurance business, should issue a policy of insurance in a state having such a statute, it would, undoubtedly, become subject to the provisions of the statute. But the business must be done by the corporation. If it furnishes goods to another, to be sold by him on his own account, he is not an agent and the corporation is not doing business within the state.[2] And if the business transacted should be the purchase of machinery or some other property or commodity to be used by it in another state as a means of carrying on its business there, the statute would not apply.[3]

The presence of the officers of a corporation in a state other than that of its creation, does not change the place of its habitation so as to authorize service in the former state, although such officers may have brought into the state

[1] Colorado Iron Works *v.* Sierra Grande Min. Co., 15 Colo. 499; 25 Pac. Rep. 325; Maxwell *v.* Atchison T. & S. F. R. Co., 34 Fed. Rep. 286.

[2] Gottschalk Co. *v.* Distilling, etc., Co., 50 Fed. Rep. 681.

[3] "True, in a limited and technical sense, almost any business transaction, no matter how trivial, made by a corporation, whether in its own or an adjacent state, the buying of goods by a domestic mercantile corporation in New York for the purpose of sale and business here, or any transaction of that kind, may be deemed the doing of business in New York. A sale and delivery of goods in Wyoming or Nebraska by a domestic corporation of this state might technically be termed doing business in those states; but such accidental or incidental transactions were not, in our view, contemplated by nor within the intention of the legislature in the section under consideration. Nor in this case can the purchase of machinery to be manufactured here, transported to, set up and operated in New Mexico, nor the selling of ores mined and produced in New Mexico, and shipped here to a market, be regarded as doing business in this state, as contemplated in such section." Colorado Iron Works *v.* Sierra Grande Min. Co., 15 Colo. 499; 25 Pac. Rep. 325, 327; St. Louis Wire Mill Co. *v.* Consolidated, etc., Co., 32 Fed. Rep. 802. See to the contrary, Klopp *v.* Crescent City Guarantee, etc., Co., 52 N. W. Rep. 819.

property of the corporation for a temporary purpose not connected with or a part of its regular business.[1]

Service by publication may be had against foreign corporations in a proper case where personal service can not be made, the same as in case of private persons.[2] But not where some representative of the corporation is within the state and can be served.[3]

It has been held that where service on a municipal corporation is required to be made by leaving a certified copy with the proper officer, a service by reading the writ to such officer, although irregular, is sufficient to uphold a judgment.[4]

In the federal courts formerly a corporation might be served in the district of its residence, or in the district where found, but under the present statute the corporation can only be served and required to answer in the district of its residence, which is the place of its incorporation, except where the action may be brought in the state of which the plaintiff is a resident and the defendant served there. A corporation is treated as an inhabitant of the state under the laws of which it is created, and a citizen thereof the same as a natural person, as respects this question of jurisdiction.[5]

So it is held that a corporation incorporated in one state only, and having a usual place of business in another state, can not be sued in a federal court in the latter state, by a citizen of a different state.[5]

[1] Carpenter *v.* Westinghouse Air Brake Co., 32 Fed. Rep. 434; Maxwell *v.* Atchison T. & S. F. R. Co., 34 Fed. Rep. 286.

[2] United States Elec. Light Co. *v.* Martin, 43 Kan. 526; 23 Pac. Rep. 586.

[3] Winney *v.* Sandwich Mf'g Co., 50 N. W. Rep. 565.

[4] Cicero Township *v.* Shirk, 24 N. E. Rep. 166. But see on this subject secs. 37, 39, *ante*.

[5] Ex parte Shaw, 145 U. S. 444; 12 Sup. Ct. Rep. 935; Railroad Co. *v.* Koontz, 104 U. S. 5, 12; United States *v.* Southern Pac. R. Co., 49 Fed. Rep. 297.

"As to natural persons, therefore, it can not be doubted that the effect of this act, read in the light of earlier acts upon the same subject,

Where the jurisdiction of the court is founded solely upon the fact that the parties are citizens of different states, the suit may be brought in the state in which either the plaintiff or defendant resides.[1] But the right to maintain the action in a state other than that of the creation of the corporation, is dependent upon some officer, agent, or other person upon whom service may be made, being within the jurisdiction of the court, where the action is personal, or the presence of property therein which will authorize proceedings against such property without personal service.[2] And sometimes the right to serve on certain agents or employes is dependent upon the presence, within the jurisdiction of the court, of property belonging to the corporation.[3]

In the federal courts, the laws of the state in which the court is held, providing for the service of process, control in actions at law where there is no act of congress on the subject.[4] Therefore, under the former acts of congress,

and of the judicial construction thereof, is that the phrase 'district of the residence of' a person is equivalent to 'district whereof he is an inhabitant,' and can not be construed as giving jurisdiction, by reason of citizenship, to a circuit court held in a state of which neither party is a citizen, but, on the contrary, restricts the jurisdiction to the district in which one of the parties resides within the state of which he is a citizen; and that this act, therefore, having taken away the alternative, permitted in the earlier acts, of suing a person in the district 'in which he shall be found,' requires any suit, the jurisdiction of which is founde l only on its being between citizens of different states, to be brought in the state of which one is a citizen, and in the district therein of which he is an inhabitant and resident. In the case of a corporation, the reasons are, to say the least, quite as strong for holding that it can sue and be sued only in the state and district in which it has been incorporated, or in the state of which the other party is a citizen." Ex parte Shaw, 145 U. S. 444, 12 Sup. Ct. Rep. 935, 937.

[1] McCormick Harvesting, etc., Co. *v.* Walthers, 134 U. S. 41; 10 Sup. Ct. Rep. 485; Ex parte Shaw, 145 U. S. 444; 12 Sup. Ct. Rep. 935; United States *v.* Southern Pac. R. Co., 49 Fed. Rep. 297.

[2] United States *v.* American Bell Tel. Co., 29 Fed. Rep. 17, 34; Tuchband *v.* Chicago & A. R. Co., 5 N. Y. Sup. 493; 115 N. Y. 437; 22 N. E. Rep. 360.

[3] Tuchband *v.* Chicago & A. R. Co., 115 N. Y. 437; 22 N. E. Rep. 360.

[4] Van Dresser *v.* Oregon Ry. and Nav. Co., 48 Fed. Rep. 202, 205; Ex parte Schollenberger, 96 U. S. 369.

authorizing a foreign corporation to be sued where found, as well as in the state of its creation, it was held that a service on its agent in the state in which it was doing business, as provided by the statute of such state, was sufficient.[1] But this can not be so under the present act of congress limiting the jurisdiction of the federal courts to inhabitants of the district except in specified cases. The jurisdiction given the state courts by state statutes can not be extended to the federal courts in opposition to an act of congress expressly denying such jurisdiction.[2]

Where a corporation is created by act of congress, an entirely different rule prevails. In such case the corporation is an inhabitant of the United States, and not of the state in which its principal place of business is located and its seal kept. It may, therefore, be sued and served in any state or district where it is doing business, and has an officer or agent upon whom service can be made.[3] And the limitation of the jurisdiction of the federal courts above referred to does not apply to maritime and admiralty causes in which a corporation of another state may be proceeded against in any district in which service may be had.[4]

The fact that a corporation created by the laws of one

[1] Ex parte Schollenberger, 96 U. S. 369; Van Dresser *v.* Oregon Ry. and Nav. Co., 48 Fed. Rep. 202, 205.

[2] Ex parte Shaw, 145 U. S. 444; 12 Sup. Ct. Rep. 935. But see on this subject the case of United States *v.* Southern Pacific R. Co., 49 Fed. Rep. 297, in which it was held by Mr. Justice Harlan, that while a corporation is a "citizen" only of the state under whose laws it was organized, yet a railroad or telegraph company chartered either by the United States, or by a state, is an "inhabitant" of any state in which it operates its lines and maintains offices for the transaction of business. Neither the reasoning nor the conclusion reached in this case, can be reconciled with Ex parte Shaw, above cited. But it must be admitted that the grounds of the conclusion reached are very strongly stated, and show the injustice of the act of congress as construed by the supreme court in the later case. It may be that the rule stated as applicable to railroad and telegraph companies may be upheld, and distinguished from other corporations, but the grounds upon which such a distinction can be supported are not now apparent.

[3] Van Dresser *v.* Oregon Ry. and Nav. Co., 48 Fed. Rep. 202.

[4] In re Louisville Underwriters, 134 U. S. 488; 10 Sup. Ct. Rep. 587.

state, does business in another state, does not change the place of its citizenship.[1]

44. WHERE CROSS-COMPLAINT IS FILED.—If new parties are brought in by a cross-complaint, they must be served in the same manner as if they were proceeded against by original complaint. But if the cross-complaint is against other plaintiffs or defendants, already before the court, service may be made on their attorneys by leaving with such attorneys a copy of such complaint, as in case of other pleadings in the action, or in such other manner as may be provided by statute.

In some of the states, service of pleadings after the complaint need not be made. Therefore, where a party is already before the court, he must take notice of all pleadings filed in the action without service.[2] But where a new and original cause of action, between defendants jointly sued, is set up by a cross-complaint filed by one of such defendants against the other, and the pleadings are not required to be served, it is held that a summons must issue.[3]

Where, under such a practice, the matters set up in the cross-complaint are alleged in the original complaint, no summons is necessary on the former, although the defendant against whom the cross-complaint is directed has suffered a default before it is filed.[4]

Where all pleadings are required to be served on the parties or their attorneys, a different rule prevails. Under such a practice, there must be service, but not of a summons. The service of a copy of the cross-complaint on the parties before the court, by service of the summons on the original complaint, and against whom the cross-complaint is directed, is sufficient.[5]

[1] Railroad Co. *v.* Koontz, 104 U. S. 5, 12; St. Clair *v.* Cox, 106 U. S. 350; 1 Sup. Ct. Rep. 354.

[2] Pattison *v.* Vaughan, 40 Ind. 253.

[3] 1 Works Ind. Pr. & Pl., sec. 208; Joyce *v.* Whitney, 57 Ind. 550; State *v.* Ennis, 74 Ind. 17.

[4] 1 Works Pr. & Pl., sec. 208; Pattison *v.* Vaughan, 40 Ind. 353; Bevier *v.* Kahn, 111 Ind. 200; 12 N. E. Rep. 169.

[5] White *v.* Patton, 87 Cal. 151.

But where a stranger to the cause, as originally brought, comes in by leave of court and sets up a cause of action against one of the original parties, summons must issue in his behalf against the party he is proceeding against.[1]

Under the equity practice in the federal courts, a cross-bill is regarded as auxiliary to the original bill, and service may be made on the attorneys of the parties against whom it is directed, although such party may be a non-resident.[2]

[1] Fowler *v.* Lewis, 14 S. E. Rep. 447, 455.
[2] Gregory *v.* Pike, 29 Fed. Rep. 588.

CHAPTER IV.

VENUE.

45. Commencement of action in wrong place and its effects.
46. Grounds for change of venue.
47. Application for change and its effects.
48. Other necessary proceedings to procure transfer.
49. Waiver as to venue.
50. Counter motion to retain case.
51. Order for change and its effects.
52. Remanding cause.

45. Commencement of action in wrong place and its effects.—The subject of territorial jurisdiction, generally, has been considered.[1] It is the purpose of this chapter to discuss the effect on the jurisdiction of the court of bringing an action in the wrong place, and the right of a party to change the venue on that and other accounts, and the effect of proceedings for a change upon the jurisdiction of the court.

Statutes usually provide specifically where all actions belonging to certain designated classes shall be brought. At common law, the venue must be laid in the proper county in local actions, or the court is without jurisdiction. But this rule has been materially modified in many if not most of the states, by statutory provisions to the effect that, where the action is brought in the wrong county, the defendant must, within a designated time, demand that the same be transferred to the proper county, or the court in which it is brought shall have jurisdiction.[2] Therefore, the effects resulting from the commence-

[1] *Ante*, sec. 15.

[2] Woodward *v.* Hanchett, 52 Wis. 482; 9 N. W. Rep. 468; Fletcher *v.* Stowell, 28 Pac. Rep. 326; Houck *v.* Lasher, 17 How. Pr. 520; West *v.* Walker, 77 Wis. 557; 46 N. W. Rep. 819; Blackford *v.* Lehigh Val. R. Co., 53 N. J. L. 56; 20 Atl. Rep. 735.

ment of an action in the wrong county are very materially modified by the rule, considered elsewhere, that where the question is as to the jurisdiction of the person, a party may submit his person to the jurisdiction of the court by appearing therein and proceeding in the action.[1]

But the mere appearance to the action, as we shall see directly, does not always amount to such a submission to the jurisdiction of the court as will prevent the party from insisting upon the removal of the cause to the proper county.[2]

Usually the time when the application for a change to the proper county shall be made is fixed by statute, and must be made within the time fixed or the right is lost.[3] And if the party is properly served with process he can not avoid the legal effect of a judgment against him, in a wrong county in the state, by failing to appear. He is bound to appear and ask for a removal of the cause to the proper county or the judgment will be binding upon him.[4] Or question the jurisdiction in some other recognized mode.[5]

If there is no statute providing that a change of venue may be had on this ground, and limiting the party to such remedy, the jurisdiction of the court may be attacked by plea in abatement, or motion to dismiss, and the party can not be driven to an application for a change of venue.[6]

But in this connection the distinction between transitory actions, which affect the question of jurisdiction of the person, and actions *in rem*, in which the place of trial affects the jurisdiction of the subject-matter, is important to be remembered. In the former, jurisdiction may be given by consent or appearance.[7] In the latter, appearance or consent can not give jurisdiction.[8] In the former, the party may relieve himself from a trial and judgment against him by timely objection, and if he

[1] *Ante*, secs. 13, 15, 43. [2] *Post*, sec. 49. [3] *Post*, secs. 47, 49.

[4] Territory *v.* Judge of District Court, 5 Dak. 275; 38 N. W. Rep. 439.

[5] *Ante*, sec. 22; Drainage Com'rs *v.* Giffin, 134 Ill. 330; 25 N. E. Rep. 995.

[6] *Ante*, sec. 22. [7] *Ante*, sec. 13. [8] *Ante*, sec. 12.

does not the judgment is valid.[1] In the latter, the court has no jurisdiction, even where the party appears and consents that it may act, and any judgment it may render with the parties all before it is absolutely void.[2] But as to the place of trial of local actions, within the state, the legislature may change this rule and put the two kinds of actions on the same footing.[3] And in some of the states this has been done.

Under statutes which require an application for a change to be made in local actions, and provide that if this is not done the court shall have power to proceed with the action, the same rule of waiver applies as in purely personal or transitory actions.[4] And it is generally held that the statute confining the party to his remedy by motion for a change of venue, general in its terms, is applicable alike to local as well as to transitory actions.[5]

[1] *Post*, sec. 49. [2] *Ante*, sec. 26.

[3] Spalding *v.* Kelly, 66 Mich. 693; 33 N. W. Rep. 803.

[4] *Post*, sec. 49; Woodward *v.* Hanchett, 52 Wis. 482; 9 N. W. Rep. 468.

[5] Woodward *v.* Hanchett, 52 Wis. 482; 9 N. W. Rep. 468; Fletcher *v.* Stowell, 28 Pac. Rep. 326; Houck *v.* Lasher, 17 How. Prac. 520; Territory *v.* Judge of District Court, 5 Dak. 275; 38 N. W. Rep. 439; West *v.* Walker, 77 Wis. 557; 46 N. W. Rep. 819.

In Woodward *v.* Hanchett, *supra*, the court said:

"This section was clearly intended to relate to all kinds of actions, and is applicable as well to actions which are local in their nature as to actions which are by statute made local by reason of the residence of the defendant or other cause, and under its provisions any action may, notwithstanding its local character, be tried in the county designated in the summons or complaint, unless the defendant causes the same to be changed in the manner pointed out in said section. The change made by the revision as well as by the code, in respect to the place of trial, is a radical one, and under its provisions no objection can now be taken either by pleading or on the trial that the action is not brought in the proper county. Such objection is one that must be taken *in limine*, and if not then taken is waived. Pereles *v.* Albert, 12 Wis. 666; Lane *v.* Burdick, 17 Wis. 92. The provisions of chapter 243, Laws of 1862, were not embodied in the Revised Statutes of 1878, and that chapter was repealed. The section above cited has provided two methods of changing the place of trial to the proper county when the plaintiff has brought his action in the wrong county. The first method is by demand of the defendant and the written consent of the plaintiff made and given within specified times, and when the demand is prop-

In other cases, however, it is held, and it is believed upon better and sounder reasons, that such statutes do not apply to actions purely *in rem*.[1]

erly made and the consent properly given, the place of trial is changed without any further proceeding, and thereafter the case proceeds as if brought originally in the county designated in the consent of the plaintiff."

In the case of Fletcher *v.* Stowell, *supra*, a distinction is made between "venue" as used with reference to the place of commencing the action and the "place of trial" as used in the code; and it is maintained that it was not the intention of the code to fix the place where actions must be *commenced*, but the place where they must be *tried*.

In Houck *v.* Lasher, 17 How. Pr. 522, the court said:

"At the common law, actions in respect to the place of trial were either *local* or transitory. In a local action a mistake in the venue was a fatal error. In a transitory action, the plaintiff was under no restraint in selecting the place of trial. But under the code this distinction does not exist. No action is strictly local in the sense in which the term is used at the common law, and no action except perhaps the actions mentioned in the 125th section of the code, in which all the parties are non-residents of the state, is strictly *transitory*. With the exception already noticed, each action has *some county* in which it is properly triable. Sometimes this is determined by the situation of the subject of the action. These actions are specified in the 123d section of the code. Sometimes it is determined by the place where the cause of action arose. Such actions are specified in the 124th section of the code. In other cases the proper county is determined by the residence of the parties. These cases are mentioned in the 125th section.

"And yet every action is so far *transitory* that the plaintiff may, with impunity, lay his venue in any county in the state. If the proper county has not been selected, the defendant has the right to have the place of trial changed. But to secure this right two things are necessary: First, he must, within a limited time, make the demand prescribed by the 126th section of the code, and then, the demand having been made, unless the change be made by consent of parties, an order of the court directing the change must be obtained. Unless both these requirements are complied with, the plaintiff may bring his action to trial in the county selected by him for that purpose." See also to the same effect, Moore *v.* Gardner, 5 How. Pr. 243; but to the contrary, under the code, see Mason *v.* Brown, 6 How. Pr. 481.

[1] Orcutt *v.* Hanson, 71 Ia. 514; 32 N. W. Rep. 482; Iowa Loan and Trust Co. *v.* Dory, 63 Ia. 459; 19 N. W. Rep. 391.

In Orcutt *v.* Hanson, *supra*, the court said: "6. Code, section 2589, contains the following provision: 'If a suit be brought in the wrong county, it may then be prosecuted to a termination, unless the defendant before answer demand a change of the place of trial to the proper county, in which case the court shall order the same at the costs of the plaintiff. . . .' If this provision be applicable to the case before us,

And in some of the states it is held that such a statute, general in its terms, applies to transitory actions only and not to local actions, whether strictly actions *in rem* or not.[1] But it is held in others that the distinction must be confined to actions purely *in rem*, where personal service on the defendant is not necessary, and no judgment can be taken against him; and can not be extended to such as are termed *quasi in rem* which are prosecuted against the person and where a seizure of the property is unnecessary.[2]

defendants, having made no motion to change the venue as contemplated in the statute, can not now complain of the judgment rendered in the case. But, in our opinion, the section is not to be applied to the case, for the reason that the circuit court of Cedar county had no jurisdiction of the subject-matter of the action, which, we think, we have above shown. To authorize a court to act in an action *in rem*, it must have jurisdiction of the subject-matter of the suit, and, in the action *in personam*, it must have jurisdiction of the person of the defendant. In personal actions, the section just quoted, and those preceding it, give to the court of the 'wrong county' jurisdiction of the person of defendants who were served with notice; but, in actions *in rem*, the court of the 'wrong county' acquires no jurisdiction of the subject-matter, under the statutes and the decisions of this court. Now, what order may a court make in an action *in rem* wherein it has no jurisdiction of the subject-matter *thereof?* None whatever, except to dismiss it, or strike it from the docket. As the court lacks jurisdiction of the subject-matter, it can make no order whatever affecting the right to the *rem*. These views are based upon the most familiar elementary principles, which demand no authorities in their support in order to assure the assent of the legal mind."

[1] McLeod *v.* Ellis, 2 Wash. St. 117; 26 Pac. Rep. 76.

[2] Fresno Nat. Bank *v.* Superior Court, 83 Cal. 491, 500; 24 Pac. Rep. 157; Territory *v.* District Court, 5 Dak. 275; 38 N. W. Rep. 439.

In Fresno Nat. Bank *v.* Superior Court, *supra*, the court said: "Nor is there any thing in the distinction between transitory actions and local actions which should affect the application of sections 5136 and 5198 of the United States Revised Statutes, or of the principles announced in Clafin *v.* Houseman, 93 U. S. 130, except, perhaps, when local actions are purely *in rem*, and therefore require no actual service of process upon any person, natural or artificial. Actions to enforce mortgages and other liens upon real property, and actions to condemn real property, for public use, are actions against the owners of property, of whose persons the court must acquire jurisdiction by actual service of process before it can render any judgment affecting their property rights. Besides, in the United States generally, and particularly in this state, the distinction between local and transitory actions, so far as any consequence attends it, depends entirely upon statutory law, which is

At common law and under the codes, independent of such statutory provisions, the rule is the other way and the jurisdiction of the court may, without an application to change the venue, be attacked at any time.[1]

In some of the states certain cases are made local by the constitution.[2] And it is held that, under such a constitutional provision, a motion for a change of venue is not the proper remedy in such cases, because the court, not having jurisdiction of the subject-matter, can have no jurisdiction to pass upon a motion to change the venue or to make any order with reference to it.[3] But there is no apparent reason why the same rule should not apply where actions are made local by statute, except that the constitutional provisions can not be modified by statutory provisions such as have been referred to above. So long as statutes exist requiring actions affecting the title to real estate to be tried in the county where the land is situated, and no provision is made limiting the remedy to an application for a change of venue in case the action is brought in the wrong county, such statutes must be the same in legal effect as like constitutional provisions.

Statutes changing this rule must be regarded as modifications of statutory provisions fixing the places where actions must be commenced and tried, and as conferring jurisdiction in cases where an action is brought in the

not necessarily nor actually uniform throughout the state, and does not coincide with or depend upon the distinction between actions *in rem* and actions *in personam*. Then, again, all those large classes of actions which are said to be *quasi in rem* require jurisdiction of the individual persons interested, and most of them are prosecuted without any seizure of the thing."

[1] *Ante*, secs. 11, 22; Campbell *v.* West, 86 Cal. 197; 24 Pac. Rep. 1000; Fletcher *v.* Stowell, 28 Pac. Rep. 326; McLaughlin *v.* McCrory, 55 Ark. 442; 18 S. W. Rep. 762; Norfolk & W. R. Co. *v.* Postal Tel., etc., Co., 14 S. E. Rep. 689; McDonal *v.* Asay, 27 N. E. Rep. 929; State *v.* Crevier, 50 N. J. L. 351; 13 Atl. Rep. 28; Heckscher *v.* City of Philadelphia, 9 Atl. Rep. 281.

[2] Fritts *v.* Camp, 94 Cal. 393; 29 Pac. Rep. 869; Urton *v.* Woolsey, 87 Cal. 38; 25 Pac. Rep. 154.

[3] Fritts *v.* Camp, 94 Cal. 393; 29 Pac. Rep. 867; Urton *v.* Woolsey, 87 Cal. 38; 25 Pac. Rep. 154.

wrong county and a removal is not asked for.[1] And if the proper application for a change of venue is made, the court is thereby deprived of all further jurisdiction, except to make the necessary order transferring the cause, for the reason that the condition upon which jurisdiction is conferred, viz., that no application for a change shall be made, no longer exists.[2]

But under statutes such as have been mentioned, it is generally held that the right to have an action brought in the proper county, in local as well as transitory actions, is a personal privilege, and may be waived, and in some cases this is held without reference to such statutes as have just been referred to.[3] And that, by a failure to plead in abatement, the objection to the jurisdiction is waived.[4] In other words, according to these cases, the common-law distinction between local and transitory actions, so far as it affects the place of commencing actions within the state, and the right to object to the jurisdiction of the court on that ground, has ceased to exist under the codes.[5]

If a local action is brought against several defendants in the wrong county, any one of them may, on his separate application, have the venue changed to the proper county.[6] But the party making the application must have a personal interest in the result of the action.[7]

In some of the cases, in which it is held that the remedy is by application for a change of venue, the right is declared to be absolute.[8] But this is so in every case in which the action is commenced in the wrong county.[9]

[1] Territory *v.* Judge District Court, 5 Dak. 275; 38 N. W. Rep. 439.

[2] Smith *v.* People, 29 Pac. Rep. 924; *post*, sec. 47.

[3] Walker *v.* Stroud, 6 S. W. Rep. 202; Watts *v.* White, 13 Cal. 321, 324.

[4] Walker *v.* Stroud, 6 S. W. Rep. 202; Houck *v.* Lasher, 17 How. Pr. 520.

[5] Houck *v.* Lasher, 17 How. Pr. 520.

[6] O'Neil *v.* O'Neil, 54 Cal. 187.

[7] Omaha, etc., Ry. Co. *v.* O'Neill, 81 Ia. 463; 46 N. W. Rep. 1100.

[8] Watts *v.* White, 13 Cal. 321, 324; Smith *v.* People, 29 Pac. Rep. 924.

[9] *Post*, sec. 50; Meiners *v.* Loeb, 64 Wis. 343; Kleiners *v.* Loeb, 25 N. W. Rep. 216; Veeder *v.* Baker, 83 N. Y. 156.

In cases made local by the constitution, it is held that, notwithstanding the constitution requires that actions affecting the title to real estate must be *commenced* in the county where the land is situated, they may be *tried* in another county, and that therefore a statute authorizing a change of venue in such cases in not unconstitutional.[1]

Cases in which the jurisdiction of the court depends entirely upon the location of the subject-matter within a county in the state, must not be confounded with cases *in rem* purely, where the court can have no jurisdiction over the subject-matter anywhere.

A court may have jurisdiction to pass upon the title to real estate or to foreclose mortgages generally. Therefore it has jurisdiction of such a subject-matter. And the sole question under the statutes we are considering is whether a court, having such jurisdiction, shall try the question of title, in the particular case, out of the county where the land lies. The decisions are to the effect that the only question in such a case is as to the *place* where it shall be tried, and that this is a matter of personal privilege that may be waived.

But if the subject-matter is one over which the court can not have jurisdiction anywhere in the state, a different rule applies. In such case, jurisdiction can not be given by consent or waiver, and any judgment rendered by the court is absolutely void.[2] However, a court may have jurisdiction to render a decree against the person, which will, if enforced, affect the title to land when the land itself is not within the jurisdiction of the court, and the court has no power to render a decree directly affecting the title.[3]

If the statute authorizes a change to another county, where the action is brought in the wrong county, it is error for the court to dismiss the action on the defendant's

[1] Hancock *v.* Burton, 61 Cal. 70.

[2] *Ante*, secs. 12, 14, 26.

[3] Carpenter *v.* Strange, 141 U. S. 87; 11 Sup. Ct. Rep. 960; Davis *v.* Headley, 22 N. J. Eq. 115; Burnley *v.* Stevenson, 24 Ohio St. 474; 15 Am. Rep. 621.

motion, or plea, as against a counter motion by the plaintiff to transfer the cause to the proper county.[1]

Where a superior court takes jurisdiction by appeal from an inferior court, the former has been held not to have jurisdiction to make an order changing the venue to another county, where the constitution gives such courts appellate jurisdiction from inferior courts of their respective counties.[2] The same rule has been applied where a cause has been transferred to a superior court, because the same is beyond the jurisdiction of the inferior court.[3]

Under a statute authorizing non-residents to be sued in any county where found, the application for a change of venue, where the action is brought in some other county, must be made. The party can not have the action dismissed on the ground that he was sued in one county and served in another.[4]

46. Grounds for change of venue.—The grounds for changes of venue are purely statutory. Without some statute authorizing the change, some other remedy must be resorted to where the action is commenced in the wrong court.[5]

Different causes for changes of venue are provided for in the different states. Of these the following may be mentioned:

a. That the action has been commenced in the wrong county or district.[6]

b. Disqualification of the judge of the court before whom the action is pending.[7]

c. Bias or prejudice of the judge or of the people of the place where the action is pending that will prevent a fair and impartial trial.

[1] Geiser Manuf'g Co. *v.* Sanders, 26 S. Car. 70; 1 S. E. Rep. 159.

[2] Gross *v.* Superior Court, 71 Cal. 382; 12 Pac. Rep. 264.

[3] Powell *v.* Sutro, 21 Pac. Rep. 436.

[4] Marquardt *v.* Thompson, 78 Ia. 158; 42 N. W. Rep. 634.

[5] Commercial Nat'l Bank *v.* Davidson, 18 Or. 57; 22 Pac. Rep. 517; Bulwer Con. Min. Co. *v.* Standard Con. Min. Co., 83 Cal. 613; 23 Pac. Rep. 1109.

[6] *Ante*, sec. 45. [7] Curtis *v.* Wilcox, 74 Mich. 69; 41 N. W. Rep. 863.

d. That the convenience of witnesses will be subserved by the trial of the case in a different place.

e. That the county in which the action is pending is a party to the suit.

f. That the trial judge is a material witness in the cause.[1]

g. Undue influence of a party or his attorney.

But all of these causes do not exist in all of the states. There is a marked difference between these grounds for a change of venue as to their effect upon the jurisdiction of the court. Where the action is brought in the wrong county, in some of the states, where this is not made a ground for a transfer of the cause to another county, and the action is local, the court has no jurisdiction, and any judgment it may render is wholly void.[2]

In those states in which the remedy of the party, where the action is brought in the wrong county, is confined to an application for a change to the proper county, the jurisdiction is contingent upon such application being made. If the application is made, the right to a change is absolute, the application puts an end to the jurisdiction of the court, and any further action on its part is wholly void.[3] But under such a statute, if no application for a change is made within the time provided, the jurisdiction of the court becomes absolute, and its proceedings are as valid and binding as if the action had been commenced in the proper county or district.[4]

If the judge of the court is legally disqualified, by reason of interest in the result of the action, or other cause, he has no jurisdiction. No application for a change is necessary. It is his duty to decline to act.[5] But the disqualification of the judge does not necessarily affect the jurisdiction of the court over which he presides. Frequently, provision is made for the holding of the court,

[1] Gray *v.* Crockett, 35 Kan. 66; 10 Pac. Rep. 452.

[2] *Ante*, secs. 26, 45.

[3] *Ante*, sec. 45; Watts *v.* White, 13 Cal. 321; *post*, secs. 47, 51.

[4] *Ante*, sec. 45.

[5] *Post*, sec. 47, 51; Freeman on Judg. 146.

for the trial of such cause, by some other judge. And there may be another competent judge within the county, district, or circuit. Therefore, such an objection does not, strictly speaking, raise a question of venue, or of the jurisdiction of the court, but of the qualifications of the judge to hold the court.[1] And in some of the states, a common-law cause can not be taken from the county on account of the disqualification of the judge, but another judge must be called to preside.[2] But if the judge proceeds to act under such circumstances, after the application for a change has been made, the validity of the proceedings are as much without jurisdiction as if the court itself were without jurisdiction, and all his acts are void.[3]

Where the ground of an application for a change of venue is on account of the bias or prejudice of the inhabitants of the county, or the convenience of witnesses, the jurisdiction of the court is not involved. In such cases it is held, in some of the states, that the right to the change is not absolute, but that the question whether the action shall be transferred or not is a matter of discretion on the part of the trial court.[4] And, even on a direct attack, by appeal, upon an order granting or refusing the change, the order will not be reversed unless it appears that the discretion of the court has been abused.[5] And counter evidence may be given in this class of cases by the opposite party.[6] This being so, the application for the change does

[1] Chicago, B. & Q. R. Co. *v.* Perkins, 125 Ill. 127; 17 N. E. Rep. 1.

[2] State *v.* Walker, 25 Fla. 561; 6 So. Rep. 169.

[3] Smelzer *v.* Lockhart, 97 Ind. 315; Krutz *v.* Howard, 70 Ind. 174, 179; Shoemaker *v.* Smith, 74 Ind. 71, 76; Freeman on Judg., sec. 146.

[4] DeWein *v.* Osborn, 12 Colo. 407; 21 Pac. Rep. 189; De Walt *v.* Hartzell, 7 Colo. 602; 4 Pac. Rep. 1201; City of Philadelphia *v.* Ridge Ave., etc., Ry. Co., 143 Pa. St. 444; 22 Atl. Rep. 695; Thompson *v.* Narwood, 19 N. Y. Sup. 632; Ringgenberg *v.* Hartman, 102 Ind. 537; 26 N. E. Rep. 91; Thorp *v.* Bradley, 75 Ia. 50; 39 N. W. Rep. 177; In re Estate of Whitson, 89 Mo. 58; 1 S. W. Rep. 125.

[5] Thompson *v.* Narwood, 19 N. Y. Sup. 632; Ringgenberg *v.* Hartman, 102 Ind. 537; 26 N. E. Rep. 91; Thorp *v.* Bradley, 75 Ia. 50; 39 N. W. Rep. 177; Clanton *v.* Ruffner, 78 Cal. 268; 20 Pac. Rep. 676.

[6] State *v.* Stewart, 74 Ia. 336; 37 N. W. Rep. 400.

not oust the jurisdiction of the court, but the truth of the facts alleged must appear to the court.[1]

But in other states, a different rule obtains, as to some of these grounds for a change of venue, because the statute makes it imperative upon the court to grant the change, upon the filing of a proper affidavit therefor, and no counter showing is allowed.[2] But it is sometimes held that, where the application only affects the question of a trial of the cause, as, for example, in case of bias and prejudice of the inhabitants, the court may proceed with the cause in the county where it is commenced until the issues are made up and the cause is ready for trial.[3] And sometimes something more than the application is necessary to divest the court of jurisdiction; for example, payment of costs.[5]

And it is held in some of the states that the application for the change does not oust the jurisdiction of the court, but the order of the court granting the change alone has that effect.[4]

The question as to the effect of the different proceedings on a motion for a change of venue on the jurisdiction of the courts from and to whom the change is taken, or sought to be taken, has been considered in another place.[5]

In order to render a judge incompetent because of his having been attorney for one of the parties, he must have been such attorney in the pending cause or some matter involved in the litigation therein.[6]

But if he has been consulted and has advised with reference to questions involved in the litigation, he is disqualified although never regularly employed as an attorney in

[1] City of Philadelphia *v.* Ridge Ave., etc., Ry. Co., 143 Pa. St. 444; 22 Atl. Rep. 695.

[2] *Post*, sec. 47; Rout *v.* Ninde, 118 Ind. 123; 20 N. E. Rep. 704.

[3] *Ante*, sec. 24, p. 152.

[4] In re Estate of Whitson, 89 Mo. 58; 1 S. W. Rep. 125.

[5] *Ante*, sec. 24, p. 151; *post*, secs. 47, 48, 51.

[6] Karcher *v.* Pearce, 14 Col. 557; 24 Pac. Rep. 568.

the pending action.[1] And if the judge has been a witness for one of the parties, as to a material and contested point in the cause, at a former trial, he is disqualified.[2]

So where the judge has received a general retainer from one of the parties, pending the litigation, he may properly decline to hear the cause and transfer the same, although not, under the statute, strictly disqualified to preside.[3]

A party can not be deprived of his right to a removal of the action by joining in the complaint a cause of action that is removable to another county with one that is not removable.[4]

47. Application for change and its effects.—As we have seen, in most of the states, where an action is brought in the wrong county, the party is required, within the time fixed by statute, to make application for the removal of the same to the proper county, in order to avoid the trial of it where brought.[5]

As to the time when the application shall be made, and the form and manner of making it, the statutes of the several states differ, but these differences are not important here.

Whatever time may be fixed by statute is binding upon the party, and his application must be made within the time or his right is lost.[6] But this is subject to the right of the court to relieve a party from an excusable neglect, or failure, to make his application in time.[7]

With respect to applications for change of venue, on other grounds, the time within which the same shall be made is often fixed by rules of courts. And so long as such rules, as to time, are not unreasonable, or in conflict

[1] Curtis *v.* Wilcox, 74 Mich. 69; 41 N. W. Rep. 863.

[2] Burlington Ins. Co. *v.* McLeod, 40 Kan. 54; 19 Pac. Rep. 354.

[3] Kern Valley Water Co. *v.* McCord, 70 Cal. 646; 11 Pac. Rep. 798.

[4] Ah Fong *v.* Sternes, 79 Cal. 30; 21 Pac. Rep. 381.

[5] *Ante*, sec. 45; *post*, sec. 49.

[6] *Post*, sec. 49; Granville County Board, etc., *v.* State Board, etc., 106 N. C. 81; 10 S. E. Rep. 1002.

[7] Shoemaker *v.* Smith, 74 Ind. 71; Shaver *v.* Huntley, 107 N. Car. 623; 12 S. E. Rep. 316; Bernhamer *v.* State, 123 Ind. 577; 24 N. E. Rep. 509.

with the law, the court has power to make them and they are as binding on the parties as if they constituted a part of the statute on the subject.[1] But if the cause for the application is not known until the time has expired, and could not have been discovered with reasonable diligence, whether the time is fixed by statute or rule of court, the party will, upon a proper showing, be allowed to make his application at a later time.[2] But it is not sufficient to show, simply, that the cause was not discovered. It must be shown that due diligence was used to discover the facts.[3]

In some of the states but one change of venue can be had by the same party, and a second application is properly denied if the party, or one of several parties, plaintiff or defendant, has already had one change of venue.[4]

As to the nature and form of the application the statute controls. In some of the states an affidavit of the party, stating the facts required by the statute to be stated, is all that is necessary.[5]

In others, a written demand for the change, in addition to the affidavit, is necessary.[6] Generally this demand is required to precede a motion for removal.[7]

This is to give the plaintiff an opportunity to consent to a change of the place of trial without the expense of a motion for that purpose, and if the demand is acceded to the jurisdiction may be transferred to the proper court by consent and without a formal application or motion.[7]

Again, in some cases, the party is required to set forth

[1] Shoemaker *v.* Smith, 74 Ind. 71; Moulder *v.* Kempff, 115 Ind. 459; 17 N. E. Rep. 906.

[2] Shoemaker *v.* Smith, 74 Ind. 71, 75; Bernhamer *v.* State, 123 Ind. 577; 24 N. E. Rep. 509.

[3] Ringgenberg *v.* Hartman, 102 Ind. 537; 26 N. E. Rep. 91; Witz *v.* Spencer, 51 Ind. 253.

[4] Peters *v.* Banta, 120 Ind. 416; 22 N. E. Rep. 95; Griffith *v.* Dickerman, 123 Ind. 247; 24 N. E. Rep. 237.

[5] Fatt *v.* Fatt, 78 Wis. 633; 48 N. W. Rep. 52.

[6] Penniman *v.* Fuller, 133 N. Y. 442; 31 N. E. Rep. 318; New Haven Clock Co. *v.* Hubbard, 16 N. Y. Sup. 125; Elam *v.* Griffin, 19 Nev. 442; 14 Pac. Rep. 582; Pennie *v.* Visher, 94 Cal. 323; 29 Pac. Rep. 711.

[7] Elam *v.* Griffin, 19 Nev. 442; 14 Pac. Rep. 582.

specifically his defense to the action.[1] And under some of the statutes other evidence than that of the party is required.[2] But whatever the terms of the statute may be they must be complied with or the change must be denied.[3]

An infant party, over the age of fifteen, has been held competent to make the necessary affidavit for removal.[4]

Usually the affidavit in support of an application for removal is required to be made by a party to the action.[5] But the affidavit of an attorney, on behalf of a party, has been held to be sufficient.[6] And in some cases a distinction is made in this respect between a change from the judge and a change from the county.[7]

Nothing more than a compliance with the statute can be required, by rules of court or otherwise.[8] But a party has no vested right to a change of venue on the terms fixed by the statute in force when an action is commenced. Therefore, a statute subsequently enacted requiring a different application must be complied with if the application for the change is made after the same has gone into force.[9]

An affidavit for a change may be amended, with leave of court, after the time it is required by statute to be made.[10]

In some of the states, it is held to be sufficient to set forth the cause relied upon, in general terms, in the language of the statute.[11] In others the facts must be stated from which the court may determine whether the cause exists or not, as in cases where it is alleged that a fair and impartial trial can not be had before the presiding judge, or that the convenience of witnesses demands it, or the

[1] Bowen *v.* Bowen, 74 Ind. 470.

[2] Garrett *v.* Bickler, 78 Ia. 115; 42 N. W. Rep. 621; Eikenberry *v.* Edwards, 71 Ia. 82; 32 N. W. Rep. 183.

[3] Smith *v.* Clark, 70 Wis. 137; 35 N. W. Rep. 318.

[4] Albert *v.* State, 66 Md. 325; 7 Atl. Rep. 697.

[5] Stevens *v.* Burr, 61 Ind. 464.

[6] Perkins *v.* McDowell, 3 Wyo. 203; 19 Pac. Rep. 440.

[7] Heshion *v.* Pressley, 80 Ind. 490. [8] Krutz *v.* Howard, 70 Ind. 174.

[9] Eikenberry *v.* Edwards, 71 Ia. 82; 32 N. W. Rep. 183.

[10] Palmer *v.* Barclay, 92 Cal. 199; 28 Pac. Rep. 226.

[11] Fatt *v.* Fatt, 78 Wis. 633; 48 N. W. Rep. 52; Fisk *v.* Patriot, etc., Tp. Co., 54 Ind. 479; 2 Works Ind. Pr. & Pl., sec. 1261.

like.[1] But when the facts are stated, it is held in some of the states that the court must take them to be true and act accordingly.[2] And, in most of the states, the party is entitled, as matter of absolute right, to a change of venue upon making his application in the form prescribed.[3] But in some of the states, under some of the grounds, the granting of the motion is within the legal discretion of the court, and the facts alleged in support of the motion may be controverted by the opposite party.[4] And where the attack is upon the judge, on the ground of bias and prejudice, and the facts are required to be stated, it is held that the judge may take into account his own knowledge of the truth or falsity of the facts alleged in determining upon the justice of the demand for a change.[5]

This is certainly a rather dangerous construction of the statute, however, unless it can be assumed that every judge is upright and honest, because, under such a construction, the very act of granting the change will frequently amount to an admission on the part of the judge that he has been in the wrong in prejudging a cause, or otherwise so conducting himself as to show that he is not fair minded and impartial. Such decisions are the natural result, however, of the abuse of statutes authorizing changes of venue.[6]

It is held, also, that the knowledge of the judge may aid a defective application.[7] But there are cases holding

[1] Vance *v.* Field, 89 Ky. 178; 12 S. W. Rep. 190; German Ins. Co. *v.* Landram, 88 Ky. 433; 11 S. W. Rep. 367; Fellows *v.* Canney, 75 Mich. 445; 42 N. W. Rep. 958; DeWalt *v.* Hartzell, 7 Colo. 601; 4 Pac. Rep. 1201.

[2] Vance *v.* Field, 89 Ky. 178; 12 S. W. Rep. 190.

[3] Fatt *v.* Fatt, 78 Wis. 633; 48 N. W. Rep. 52; Stevens *v.* Burr, 61 Ind. 464.

[4] *Ante*, sec. 46; Garrett *v.* Bickler, 78 Ia. 115; 42 N. W. Rep. 621; Hawes *v.* State, 88 Ala. 37; 7 Sou. Rep. 302; North-eastern Neb. Ry. Co. *v.* Frazier, 25 Neb. 42; 40 N. W. Rep. 604; City of Philadelphia, *v.* Ridge Ave., etc., Ry. Co., 143 Pa. St. 444; 22 Atl. Rep. 695; Clanton *v.* Ruffner, 78 Cal. 268; 20 Pac. Rep. 676.

[5] Garrett *v.* Bickler, 78 Ia. 115; 42 N. W. Rep. 621.

[6] Vance *v.* Field, 89 Ky. 178; 12 S. W. Rep. 190; Garrett *v.* Bickler, 78 Ia. 115; 42 N. W. Rep. 621.

[7] Gray *v.* Crockett, 35 Kan. 66; 10 Pac. Rep. 452.

that, a proper affidavit being made, the knowledge of the judge can not be used to defeat the right to a change.[1]

Disqualification of the judge does not always entitle a party to a change from the county.[2] And in some of the states no such change can be had on that ground, except upon consent of all the parties.[3]

Usually, where the application is on the ground of convenience of witnesses, the same can not be made until the issues are formed,[4] and the affidavit is required to show merits and that the facts to which the witness will testify have been stated to counsel.[5] And that he has fully and fairly stated the case to his attorney, and that he is informed by his attorney that he has a good and meritorious cause of action or defense.[6]

Where the transfer of a cause is allowed, if the judge of the county to which the removal is asked is qualified to hear the cause, that such judge is qualified must be affirmatively shown.[7]

If the ground is that the judge is disqualified, by reason of his having been of counsel, or the like, no formal application for a change is necessary. It is the duty of the court to order the change upon a mere suggestion of the fact or upon his own motion.[8] But this is not so where the ground is that the action is brought in the wrong county, although the right to a removal is absolute.[9]

Where the change is asked on the ground that defendants residing in the county have been fraudulently joined, in order to give the court jurisdiction over the applicant, who resides in another county, a question of fact is presented, the right to a change is not absolute, and the question of removal is one within the discretion of the court.[10]

[1] Witter *v.* Taylor, 7 Ind. 110; Fisk *v.* Patriot, etc., Tp. Co., 54 Ind. 479.
[2] *Ante*, sec. 46. [3] State *v.* Walker, 25 Fla. 561; 6 Sou. Rep. 169.
[4] Thomas *v.* Placerville G. Q. Min. Co., 65 Cal. 600; 4 Pac. Rep. 641.
[5] Briasco *v.* Lawrence, 4 N. Y. Sup. 94.
[6] People *v.* Larue, 66 Cal. 235; 5 Pac. Rep. 157; Johnson *v.* Walden, 12 Pac. Rep. 257.
[7] Kelly *v.* Alcona Circuit Court, 79 Mich. 392; 44 N. W. Rep. 925.
[8] Joyce *v.* Whitney, 57 Ind. 550. [9] Watts *v.* White, 13 Cal. 321.
[10] Walker *v.* Nettleton, 52 N. W. Rep. 864.

48. OTHER NECESSARY PROCEEDINGS TO PROCURE TRANSFER. —Usually an affidavit stating the facts authorizing it is all that is necessary to entitle a party to a change of venue.[1] But in some of the states a written demand for the change, either before or at the time of making the necessary showing is required.[2] And it is sometimes required that in order to divest the court in which the action is made of jurisdiction, and transfer it to the court to which the cause is to be removed, other steps shall be taken by the party making the application. As, for example, the payment or tender of the costs, or the costs occasioned by the change,[3] or that the papers in the cause be transmitted to the court to which the cause is removed within a limited time.[4] And where such conditions are imposed, even though they are required to be performed after the order for the change is made, the failure to perform them renders all prior proceedings of no effect and the jurisdiction remains where it was in the beginning.[5]

But, pending the time within which such conditions may be performed, the juriediction of the court is suspended,[6] except that where the change is asked on grounds not affecting the judge, the court may proceed with the making up of the issues in some cases,[7] or where some further action is authorized by statute in order to preserve the rights of the parties.[6]

But such conditions are not usually imposed where the

[1] *Ante*, sec. 47.

[2] *Ante*, sec. 47; Penniman *v.* Fuller, 133 N. Y. 442; 31 N. E. Rep. 318; New Haven Clock Co. *v.* Hubbard, 16 N. Y. Sup. 125; Elam *v.* Griffin, 19 Nev. 442; 14 Pac. Rep. 582; Pennie *v.* Visher, 94 Cal. 323; 29 Pac. Rep. 711.

[3] *Ante*, sec. 24, p. 152; Oakley *v.* Dunn, 63 Mich. 494; 30 N. W. Rep. 96; Duncan *v.* Tufts, 52 Ark. 404; 12 S. W. Rep. 873; Estep *v.* Armstrong, 69 Cal. 536; 11 Pac. Rep. 132.

[4] *Ante*, sec. 24, p. 152; Cook *v.* McDonnell, 70 Wis. 329; 35 N. W. Rep. 556.

[5] *Ante*, sec. 24, p. 152; *Post*, sec. 51; Oakley *v.* Dunn, 63 Mich. 494; 30 N. W. Rep. 96.

[6] Fisher *v.* Cid Copper Min. Co., 105 N. Car. 123; 10 S. E. Rep. 1055.

[7] *Ante*, sec. 24, p. 152.

action is commenced in the wrong county, and the party is entitled to a change as a matter of right.

If the cause is tried in the court in which the action is brought, after an application for a change of venue has been made, it will be presumed, on appeal, there being no showing to the contrary, that subsequent conditions, necessary to divest the court of jurisdiction, were not performed.[1]

A party may be relieved from the effect of a failure to perform conditions of this character upon a proper showing.[2] But an offer to perform the condition, after the time fixed by law or the order of the court, where the same may be fixed by the court, without sufficient excuse for not having done so at the proper time, is of no avail.[3]

The court can not impose upon the applicant conditions not required by the statute to be performed.[4]

49. Waiver as to venue.—As a rule the right to the trial of a case in a particular place is held to be a personal privilege that may be waived. This is undoubtedly so in transitory actions or those in which jurisdiction of the person alone is involved.[5] And in some cases the same rule has been applied in what were, at common law, local actions, or those in which the location of the subject-matter of the action fixed and determined the jurisdiction, where the party is limited by statute, in his right to question the jurisdiction, to an application for a change of venue.[6] But, as we have seen elsewhere, the rule on the subject is not uniform.[7]

In all cases in which the remedy of the party for the commencement of an action in the wrong place is con-

[1] Duncan *v.* Tufts, 52 Ark. 404; 12 S. W. Rep. 873.

[2] Cook *v.* McDonnell, 70 Wis. 329; 35 N. W. Rep. 556.

[3] Estep *v.* Armstrong, 69 Cal. 536; 11 Pac. Rep. 132.

[4] *Ante*, sec. 47; Bantley *v.* Stowell, 52 N. W. Rep. 92; South Pueblo, etc., Co. *v.* Moore, 10 Colo. 254; 15 Pac. Rep. 333.

[5] *Ante*, secs. 13, 15, 43.

[6] *Ante*, sec. 45; Walker *v.* Stroud, 6 S. W. Rep. 202.

[7] *Ante*, sec. 45.

fined to an application to change the venue, a failure to make such application within the time fixed by law, or rule of court, in the absence of some legal excuse therefor, is a waiver of the objection, and vests the court in which the action is brought with full jurisdiction to proceed to a final determination of the cause.[1]

The same rule as to waiver applies where the question is one not affecting the jurisdiction of the court, as in case of local prejudice and like causes for a change of venue.[2] But the entrance of a full appearance to the action does not usually amount to a waiver as would be the case if the question were one of jurisdiction of the person purely.

Statutes usually require the application for a change of venue to be made at the time of, or within a certain time after the answer is filed.[3] But in many cases the cause for the change may not be discovered until the time within which the application is required to be made has expired. In such cases, upon a proper showing of the reasons for not having made the motion at an earlier day, the change will be allowed.[4]

Where the demand for a change of the place of trial is required to be filed with the answer it is held that it may be filed with an amended answer.[5] But an objection to the venue is waived by filing an answer to the merits al-

[1] *Ante*, secs. 45, 47; Powell *v.* Sutro, 80 Cal. 559; 22 Pac. Rep. 308; Duffy *v.* Hickey, 68 Wis. 380; 32 N. W. Rep. 54.

In the case of Powell *v.* Sutro, *supra*, it was held that under a statute requiring the application to be made at the time the defendant appears and answers, or demurs, an application could not be made in the superior court where an answer had been filed in the justice's court, which had the effect to oust that court of all jurisdiction in the action and transfer jurisdiction to the superior court. But the decision was rendered by a bare majority of the court and is not in harmony with the well-settled rule that where a party is prevented, without his fault, from making the application within the time limited he may make it at the earliest opportunity thereafter. *Ante*, secs. 45, 47.

[2] Ringgenburg *v.* Hartman, 102 Ind. 537; 26 N. E. Rep. 91.

[3] Powell *v.* Sutro, 80 Cal. 559; 22 Pac. Rep. 308.

[4] *Ante*, sec. 47; Shoemaker *v.* Smith, 74 Ind. 71.

[5] Penniman *v.* Fuller & Warren Co., 133 N. Y. 442; 31 N. E. Rep. 318.

though the answer is filed before the expiration of the time allowed the defendant to file the same.[1]

Where an application for a change has been made and denied where the complaint stated no cause of action, it is held that the application may be renewed if a sufficient complaint is subsequently filed and that the order denying the change is not an adjudication which will estop the defendant from making the second application.[2]

In some of the states it is provided that the objection that the action was commenced in the wrong county, or district, may be made at the trial, and that upon proof of the fact the same must be dismissed. Under such a statute the failure to make the objection at an earlier date is not a waiver of the right.[3]

The party who demands a change of the place of trial must insist upon a ruling by the court. If the motion does not appear to have been ruled upon, and the action is proceeded with, the party filing his answer, he will be held, on appeal, to have waived his objection to the jurisdiction.[4]

Where the party procuring the order of removal is required to cause the papers in the case to be transmitted within a certain time a failure to comply with the requirement is, under the statutes of some of the states, a waiver of the right to a change.[5]

Defects in the application for a change of venue may be waived by a failure to make them at the proper time. When the application or affidavit is defective, merely, it is too late to make the objection in the court to which the action has been removed.[6] And a consent to a change to a court having jurisdiction of the subject-matter of the action is a waiver of the necessary application therefor.[7]

[1] Granville Co. Board of Ed. *v.* State Board, 106 N. Car. 81; 10 S. E. Rep. 1002.

[2] Veeder *v.* Baker, 83 N. Y. 163.

[3] Baer *v.* Kempner, 3 N. Y. Sup. 529.

[4] Knott *v.* Dubuque, etc., S. C. R. Co., 51 N. W. Rep. 57.

[5] Cook *v.* M'Donnell, 70 Wis. 329; 35 N. W. Rep. 556.

[6] Squires *v.* Chillicothe, 89 Mo. 226; 1 S. W. Rep. 23.

[7] Township *v.* County of Marion, 110 Ind. 579; 10 N. E. Rep. 291.

So where consent is given to the hearing of the application on proof other than that required by law.[1] And where the court to which the cause is removed has jurisdiction of the subject-matter of the action an appearance in the action, in such court, is a waiver of any objection to the jurisdiction over the person and of any defects in the proceedings to procure the change.[2]

50. Counter motion to retain case.—In most of the states a change of the place of trial from one county to another may be had for the convenience of witnesses.[3] But the fact that the convenience of witnesses will be subserved by the trial of the case in a county other than the one in which the action should be brought is no reason or justification for bringing the action in such county. Therefore, if the action is brought in such county, and a motion is made to change the place of trial on the ground that the case was commenced in the wrong county, it is no defense to such an application that it will be to the convenience of the witnesses to try the cause in the county in which it was commenced, nor will a counter motion to have the court retain jurisdiction, on that ground, be entertained. The cause must first be removed to the court having jurisdiction, leaving the party who has commenced it in the wrong county to make his application in that court for a change of the place of trial.[4]

The right of the defendant to a change of venue in such case is absolute, and can not be defeated by a counter motion to retain the cause. But if a change of the place of trial is asked for, on grounds which address themselves to the discretion of the court, there is no reason why the court should not consider other causes which would tend

[1] Kelly *v.* Alcona Circuit Judge, 79 Mich. 392; 44 N. W. Rep. 925.

[2] Aurora F. Ins. Co. *v.* Johnson, 46 Ind. 315, 321.

[3] *Ante*, sec. 46.

[4] Veeder *v.* Baker, 83 N. Y. 163; Park *v.* Carnley, 7 How. Prac. 355; Moore *v.* Gardner, 5 How. Prac. 243; Van Kleck *v.* Hanchett, 51 Wis. 398; 8 N. W. Rep. 236. But see on this point Mason *v.* Brown, 6 How. Prac. 481; Couillard *v.* Johnson, 24 Wis. 533. A contrary rule is maintained in some of the states. Edwards *v.* S. P. R. R. Co., 48 Cal. 460; Hanchett *v.* Finch, 47 Cal. 192; Hall *v.* C. P. R. R. Co., 49 Cal. 454.

to establish the justice of a demand that the action be retained and tried in the county in which it is pending.[1]

The question must necessarily turn upon the language of the statute authorizing the change. If the right is absolute, and without qualification, the demand for the change must be complied with and no counter motion to retain the case on other grounds can be entertained.[2] But if the granting of the change is within the discretion of the court and the propriety of such change may properly be inquired into, the court may consider other reasons tending to show the propriety of retaining the case.[3]

But usually, where the motion for removal is on other grounds than that the action was commenced in the wrong county, no counter motion is necessary. Every thing which would tend to defeat the motion may be shown in defense and without a counter motion.[4]

In some of the cases the right to resist an application for removal of a cause, commenced in the wrong county, on the ground of convenience of witnesses, has been denied where the issues were not made up, on the ground that the question of the convenience of witnesses can not be passed upon until the issues are formed and the necessity for witnesses can be determined.[5] And the court can not delay action on the application for the change until the issues are made up, in order to give an opportunity to interpose a counter motion to retain the action on account of the convenience of witnesses.[6]

51. Order for change and its effects.—There is some discrepancy in the decided cases as to what it is in the proceedings relating to changes of venue that divests the

[1] See Mason *v.* Brown, 6 How. Prac. 481; Park *v.* Carnley, 7 How. Prac. 355; Couillard *v.* Johnson, 24 Wis. 533, 537.

[2] Van Kleck *v.* Hanchett, 51 Wis. 398; 8 N. W. Rep. 236; Kleiners *v.* Loeb, 25 N. W. Rep. 216; Meiners *v.* Loeb, 64 Wis. 343.

[3] Couillard *v.* Johnson, 24 Wis. 533; Van Kleck *v.* Hanchett, 51 Wis. 398; 8 N. W. Rep. 236.

[4] Cook *v.* Pendergast, 61 Cal. 72.

[5] Bonnell *v.* Esterly, 30 Wis. 549; Cook *v.* Pendergast, 61 Cal. 72.

[6] Heald *v.* Hendy, 65 Cal. 321.

court of jurisdiction. This must depend, in part, upon the grounds for the application as well as upon the language of the statute under which the change is asked for. Where the ground of the application is that the court has not jurisdiction because the action has been brought in the wrong county it is generally, but not uniformly, held that the right to a change is absolute and that the mere making of the proper application divests the court of all power to proceed further in the cause than to make the necessary order for the removal of the same to the proper court.[1]

In some of the states where application for removal is made on other grounds than that the action is brought in the wrong county, the right to the change, upon proper application therefor, is absolute, and upon making such application the jurisdiction of the court then ceases.[2]

Under such a rule the order for the change must be made as a matter of course, and it is not the order, but the application, that terminates, or suspends, the jurisdiction of the court. But, strictly speaking, whether it is the application or the order that transfers it, the jurisdiction is only suspended and is subject to be revived by a failure on the part of the applicant to comply with subsequent conditions, where such conditions are imposed, such as payment of costs, transmission of papers, and the like.[3]

The order for removal does not generally transfer jurisdiction to the court to whom the case is ordered to be sent at the time the order is made. This is done by filing a transcript of the order and the papers or transcript of the same, as may be required, in that court.[4]

In the meantime, unless authority is given to one or the other of the courts to act, neither court has jurisdiction to proceed in the cause. But when the transcript of the order of removal reaches the court to which the cause is

[1] *Ante*, sec. 24, p. 151, secs. 45, 47; Smith *v.* People, 29 Pac. Rep. 924.

[2] *Ante*, sec. 47; Fatt *v.* Fatt, 78 Wis. 633; 48 N. W. Rep. 52; Stevens *v.* Burr, 61 Ind. 464.

[3] *Ante*, sec. 24, p. 151, secs. 47, 48.

[4] Fawcett *v.* The State, 71 Ind. 590.

removed, it is the order of the court from which it is transmitted that vests the former court with jurisdiction.[1] And no limitation of such jurisdiction can be effected by any provision in an order, otherwise sufficient to vest full jurisdiction, nor can any condition as to the time or manner of taking or acquiring such jurisdiction, not provided for by law, be imposed by such order.[1]

But there are cases holding that by the entry of the order the court making it loses jurisdiction at that moment, and the court to which it is ordered removed acquires jurisdiction thereby, and at the same time.[2]

Where some subsequent act on the part of the applicant for the change is required, as for example the payment of costs, the jurisdiction of the court stands suspended, when the order is made, until such act is performed, and if it is not performed within the time fixed by law or the order of the court, the court may set aside its order granting the change and resume jurisdiction of the action.[3]

If it appears from the order, or other part of the record, that no legal cause for removal exists the court to which the cause is sent has no jurisdiction and should refuse to hear the same.[4]

It is otherwise if the facts authorizing a change of venue do not in fact exist, but the fact of their non-existence does not appear from but must be proved by evidence *dehors* the record. The proper place to contest the question whether a cause for removal is shown in such case or not is in the court in which the application is made. It can not be contested by evidence outside of the record in the court to which the cause is removed.[5]

It is held that if a removal is authorized by law, only

[1] State *v.* Weddington, 103 N. Car. 364; 9 S. E. Rep. 577.

[2] *In re*, Whitson, 89 Mo. 58; 1 S. W. Rep. 125.

[3] Estep *v.* Armstrong, 69 Cal. 536; 11 Pac. Rep. 132.

[4] Kahanek *v.* Galveston H. & S. A. Ry. Co., 72 Tex. 476; 10 S. W. Rep. 570; Taylor *v.* Williams, 26 Tex. 583.

[5] See Kahanak *v.* Galveston H. & S. Ry. Co., 72 Tex. 476; 10 S. W. Rep. 570; Hall *v.* Jackson, 3 Tex. 305, 308; Stearns *v.* St. Louis & S. F. Ry. Co., 94 Mo. 317; 7 S. W. Rep. 270; Squires *v.* Chillicothe, 89 Mo. 226; 1 S. W. Rep. 23.

on condition, and the record fails to show the existence of such condition, the court to which the action is removed does not acquire jurisdiction.[1] The presumption is, usually, however, that the court acted rightly in granting the change, and that the circumstances authorizing the removal of the cause actually existed.[2]

But the distinction between a case where there is an entire want of jurisdiction in the court to grant a change of venue, or one in which no change could be granted under any circumstances, or one where a change is authorized upon a certain showing and no showing whatever has been made, and cases where the court has jurisdiction to grant a change, and the proceedings had to obtain it are defective, merely, must be borne in mind. In the former the order of the court is a nullity and vests no jurisdiction in the court to which the cause is removed.[3] In the latter the order is erroneous, and not void, the latter court acquires jurisdiction, and the action of the court in granting the change can only be reviewed on appeal or attacked in some other direct way authorized by law. It can not be attacked collaterally.[4] And the objection should be taken in the court making the order, and not in the court to which the cause is removed, and the necessary exception taken and preserved there, as a foundation for the appeal.[5]

There are cases, however, which seem to overlook this distinction.[6]

Where the question of removal depends upon the proof of certain facts, and the evidence is not conflicting, but is all one way, the question on appeal from an order grant-

[1] Howe *v.* Stevenson, 84 Ky. 576; 2 S. W. Rep. 231.

[2] Hall *v.* Jackson, 3 Tex. 305; Shirts *v.* Irons, 47 Ind. 445, 453.

[3] Baum *v.* Burns, 66 Miss. 124; 5 Sou. Rep. 697.

[4] Stearns *v.* St. Louis & S. F. Ry. Co., 94 Mo. 317; 7 S. W. Rep. 270; Squires *v.* Chillicothe, 89 Mo. 226; 1 S. W. Rep. 23; Fellows *v.* Canney, 75 Mich. 445; 42 N. W. Rep. 958; Joerns *v.* La Nicca, 75 Ia. 705; 38 N. W. Rep. 129; Dimmitt *v.* Robbins, 74 Tex. 441; 12 S. W. Rep. 94; Gage *v.* Downey, 19 Pac. Rep. 113, 118.

[5] *Ante*, sec. 49; Squires *v.* Chillicothe, 89 Mo. 226; 1 S. W. Rep. 23.

[6] Vance *v.* Field, 89 Ky. 178; 12 S. W. Rep. 190.

ing or refusing a change of venue becomes one of law, and the decision of the court below, or officer who is authorized to pass upon the question, is not conclusive.[1] But if the evidence is conflicting the decision is conclusive and will not be reviewed on appeal,[2] unless there appears to have been an abuse of discretion.[3]

It is held, in some cases, that where the place of trial is changed by consent no order for such change is necessary, and that the consent of parties and filing of the papers in the court to which the cause is to be removed, is all that is necessary to give that court jurisdiction.[4]

It has been held that a conditional order for a change of the place of trial upon payment of costs may be made, followed by an absolute order of transfer upon such costs being paid, or an order denying the change on the ground that such costs have not been paid.[5]

The court making an order changing the venue has jurisdiction to set such order aside on the ground that it was inadvertently made.[6]

52. Remanding cause.—If the cause has been removed without authority of law or under such circumstances as would render the order of removal void, no application to remand the cause is necessary, and it would seem that the court to which it has been transferred would have no jurisdiction to make any order for the return of the case to the proper court because, the order being void, the jurisdiction has never been transferred, but remains where it was in the beginning.[7] Such being the case the court to which the action has been attempted to be transferred

[1] Curtis *v.* Wilcox, 74 Mich. 69; 41 N. W. Rep. 863; Kennon *v.* Gilmer, 131 U. S. 22; 9 Sup. Ct. Rep. 696.

[2] Fellows *v.* Canney, 75 Mich. 445; 42 N. W. Rep. 958; Thompson *v.* Norwood, 19 N. Y. Sup. 632; Hamilton *v.* Des Moines & K. C. Ry. Co., 50 N. W. Rep. 567.

[3] Thompson *v.* Norwood, 19 N. Y. Sup. 632; *Ante*, 46, 47.

[4] *Ante*, sec. 47; Woodward *v.* Hanchett, 52 Wis. 482; 9 N. W. Rep. 468.

[5] Armstrong *v.* Superior Court, 63 Cal. 410.

[6] Baker *v.* Fireman's Fund Ins. Co., 73 Cal. 182; 14 Pac. Rep. 686.

[7] *Ante*, sec. 51.

could be prevented from proceeding, and the court in which it was commenced could be compelled to proceed with it.

But it has been held that where a change of venue has been ordered in a case, not authorized by law, which would render the order void, the court to which the case has been transferred may direct the case to be retransferred to the court making the order, and that an order for such transfer may be made by the appellate court on appeal.[1]

If the action has been irregularly transferred and such irregularity has not been waived by a failure to make the proper objection in the court making the order, or in some other way,[2] the proper practice is to move the court to which the case has been removed to remand the same to the court making the order. But if the proceedings resulting in the change are irregular, merely, and not void, the court to which the case has been removed has jurisdiction, and its refusal to remand the same is an error, merely, which can only be taken advantage of by a direct proceeding.[3] And the error is one that may be waived by appearing and proceeding in that court.[4]

Under such circumstances the court can not arbitrarily and of its own motion remand the cause.[6] But it may be remanded by consent of the parties.[5]

[1] Rogers *v.* Watrous, 8 Tex. 62, 65; 58 Am. Dec. 100.

[2] *Ante*, sec. 49.

[3] *Ante*, sec. 51; Mannix *v.* State, 115 Ind. 245; 17 N. E. Rep. 565.

[4] *Ante*, sec. 49; Howe *v.* Stevenson, 84 Ky. 576; 2 S. W. Rep. 231.

[5] Coleman *v.* Floyd, 31 N. E. Rep. 75.

[6] Hazard *v.* Wason, 152 Mass. 268; 25 N. E. Rep. 465.

CHAPTER V.

JUDGES.

53. Defined.
54. Power of legislature to confer or take away jurisdiction.
55. Power of legislature to impose other than judicial duties on judges.
56. General powers and duties of judges.
57. Power to act in another district.
58. Authority at chambers.
59. Authority to act in vacation.
60. *De jure* and *de facto* judges.
61. Special judges.
62. Judges disqualified by interest or otherwise.
63. Bias and prejudice of judges as affecting jurisdiction.
64. Liability of judge acting without jurisdiction.

53. Defined.—A judge is defined to be "a public officer whose function is to declare the law, to administer justice in a court of law, to conduct the trial of causes between litigants according to legal forms."[1] But, as we are here to consider it, the term must be given a much broader scope and meaning so as to include any and all persons authorized to decide litigated questions, but who do not constitute or act as a court, such as commissioners, referees, arbitrators, and others appointed for a temporary purpose, but whose decisions are binding upon the parties either with or without the confirmation of such decisions by a court,[2] and other officers acting partly in a judicial and partly in an executive, legislative, or ministerial capacity.[3] Strictly speaking, however, such officers, although exercising judicial functions, are not judges, and

[1] Anderson's Dic. of Law, 574.

"A judge is a public officer appointed to decide litigated questions according to law; an officer so named in his commission, and who presides in some court." 12 Am. & Eng. Enc. of Law, 2; Bouv. Law Dic., title, Judge.

[2] Anderson's Dic. of Law, 575.

[3] People *v.* Mann, 97 N. Y. 530, 532; 49 Am. Rep. 556.

are not included in legislation applicable to judges by that designation.[1] But, as affecting their action as judicial officers, they may properly be so treated, although not always to be controlled by the same rules of law as affecting the question of jurisdiction.[2]

At the present day justices of the peace are judges so far as the rules of law affecting their judicial acts are concerned.[3] So members of a court martial are judges.[4] In many of the states the term "justice" is used in designating the office instead of judge, but not as distinguishing one from the other as different officers.[5] A judge may be authorized to perform purely ministerial or executive duties, but when so acting he can not be regarded as a judge, nor will the acts done by him be treated as judicial because they are performed by a judicial officer.[6] On the other hand, unless prohibited by constitutional provisions, the legislature may confer upon executive or legislative bodies or officers, judicial functions, and when acting judicially, they are controlled by the rules of law applicable to judges.[7]

54. Power of legislature to confer or take away jurisdiction.—The powers with which judges are clothed, may be constitutional or legislative.[8] If constitutional, they are beyond the power of the legislature to limit or control.[9] And where a court is created and jurisdiction conferred upon it by the constitution, the legislature can not

[1] People *v.* Carr, 100 N. Y. 236; 3 N. E. Rep. 82; People *v.* Mann, 97 N. Y. 530, 532; 49 Am. Rep. 556; Foot *v.* Stiles, 57 N. Y. 399.

[2] Foot *v.* Stiles, 57 N. Y. 399; *Post*, sec. 62.

[3] *Ante*, secs. 6, 7; Baldwin *v.* McArthur, 17 Barb. (N. Y.) 414, 423.

[4] Vanderheyden *v.* Young, 11 Johns. (N. Y.) 150.

[5] Anderson's Dic. of Law, 575.

[6] *Post*, sec. 55; People *v.* Bush, 40 Cal. 344; Spring Valley W. W. *v.* Bryant, 52 Cal. 132, 136; People *v.* Provines, 34 Cal. 520.

[7] Spring Valley W. W. *v.* Bryant, 52 Cal. 132.

[8] *Ante*, secs. 10, 24.

[9] *Ante*, sec. 24; *In re* Constitutionality of Senate Bill, 21 Pac. Rep. 471; Harris *v.* Vandeveer, 21 N. J. Eq. 424; Hutkoff *v.* Demorest, 103 N. Y. 377; 8 N. E. Rep. 899; Landers *v.* Staten Island R. R. Co. 53 N. Y. 450; Alexander *v.* Bennett, 60 N. Y. 204.

authorize a commissioner appointed for the purpose to perform the duties imposed upon the court.[1] Not only so, but it is generally held that the legislature can not confer judicial powers upon non-judicial officers.[2] Nor can such powers be conferred by consent of parties.[3] But it must not be understood from this that the same officer may not perform both ministerial or executive and judicial functions. It is not an uncommon practice to confer upon the same officer or body of officers these different duties.[4] And when exercising judicial functions, such an officer is a judicial officer, but when acting in a legislative, executive, or administrative capacity, he belongs, for the time being, to one of the other classes of officers as the case may be. But whether the duties pertaining to different departments of government can be imposed upon and exercised by the same officer, must depend upon the constitution under which the office exists.[5]

In many, if not most of the states, the different departments of government are kept entirely separate from each other, and it is provided by the constitution that an officer of one department shall not perform the duties pertaining to another department. Under such a constitutional inhibition, the legislature can not confer judicial powers upon an officer of the legislative or executive department.[6]

The rule is the same where the constitution vests all ju-

[1] *Ante*, sec. 29, p. 194; State *v.* Noble, 118 Ind. 361; 21 N. E. Rep. 244; 12 Am. & Eng. Enc. of Law, 4; Vandercook *v.* Williams, 106 Ind. 345, 356; 1 N. E. Rep. 619; 8 N. E. Rep. 113.

[2] Vandercook *v.* Williams, 106 Ind. 345, 356; 1 N. E. Rep. 619; 8 N. E. Rep. 113; State *v.* Noble, 118 Ind. 350; 21 N. E. Rep. 244; Gregory *v.* The State, 94 Ind. 384; 48 Am. Rep. 162; Stone *v.* Elkins, 9 Cal. 125.

[3] Hoagland *v.* Creed, 81 Ill. 506.

[4] *Post*, sec. 55; *Ante*, sec. 53; 12 Am. & Eng. Enc. of Law, 2, 6, 7, notes; People *v.* Provines, 34 Cal. 520; People *v.* Keeler, 99 N. Y. 463, 479; Keeler *v.* McDonald, 2 N. E. Rep. 615; People *v.* Bush, 40 Cal. 344.

[5] *Post*, sec. 55.

[6] Vandercook *v.* Williams, 106 Ind. 345, 357; 1 N. E. Rep. 619; 8 N. E. Rep. 113; Elmore *v.* Overton, 104 Ind. 548; 4 N. E. Rep. 197; Shoultz *v.* McPheeters, 79 Ind. 373; Pressly *v.* Lamb, 105 Ind. 171, 185; 4 N. E. Rep. 682; Hall *v.* Marks, 34 Ill. 358.

dicial powers in the courts, without any direct provision against the exercise of such powers by non-judicial officers.[1] But there are many duties, judicial in their nature and which call for the exercise of judgment, which are held not to be strictly so, and, therefore, not within these constitutional inhibitions.[2] And such a provision of the constitution has the effect to abrogate statutory provisions then in force vesting jurisdiction in officers not named in the constitution, and of depriving such officers of the powers thus given them.[3]

Where judicial power is vested by the constitution in

[1] *Ante*, sec. 29; State *v.* Noble, 118 Ind. 350; 21 N. E. Rep. 244; Van Slyke *v.* Trempealeau County, etc., Ins. Co., 39 Wis. 390; 20 Am. Rep. 50; Attorney-General *v.* McDonald, 3 Wis. 805; State *v.* Maynard, 14 Ill. 419; Kilbourn *v.* Thompson, 103 U. S. 168, 192.

[2] Wilkins *v.* State, 113 Ind. 514; 16 N. E. Rep. 192; Elmore *v.* Overton, 104 Ind. 548; 4 N. E. Rep. 197; Kuntz *v.* Sumption, 117 Ind. 1; 19 N. E. Rep. 474; In re Stevens, 83 Cal. 322, 332; 23 Pac. Rep. 379.

"Scrupulous care was taken by the framers of our constitution to distribute the powers of government, and to define and fix the rights and powers of the great departments to which these rights and powers were distributed. The boundaries of each are marked with certainty and precision. There can be no doubt where the judicial power is vested. Section 1, of article 7, as originally framed, read thus: 'The judicial power of the state shall be vested in a supreme court, in circuit courts, and in such inferior courts as the general assembly may establish.' On the 14th day of March, 1881, the electors of the state, at a special election held on that day, ratified an amendment to the section and article named. This amendment reads as follows: 'The judicial powers of the state shall be vested in a supreme court, circuit courts, and such other courts as the general assembly may establish.' All judicial powers are, by force of this provision, vested in the courts of the state. The legislature has no authority to invest any other tribunals than the courts with judicial powers.

"It is certain that the legislature can not exercise judicial powers. The Columbus, etc., Ry. Co. *v.* The Board, etc., 65 Ind. 427; Doe *v.* Douglass, 8 Blackf. 10; Young *v.* The State Bank, 4 Ind. 301. Nor can these powers be vested elsewhere than in the tribunals designated or indicated by the constitution. Judicial powers can not be delegated. Taking and following as guides these fundamental principles, we are led to the conclusion that judicial powers can not be vested in officers, such as master commissioners, appointed by the judges of the courts." Shoultz *v.* McPheeters, 79 Ind. 373.

[3] State *v.* Maynard, 14 Ill. 419; Hitts *v.* City of Chicago, 60 Ill. 86, 92.

courts, it can not be given to judges as distinguished from the courts in which they officiate.[1] But whether an act to be done is in fact a judicial one which must be performed by a court or not, may sometimes be determined from the act of the legislature.[2]

It is held that the judge of a court may be invested with jurisdiction of matters over which his court has no jurisdiction and which are supplementary to the jurisdic-

[1] Spencer Creek Water Co. *v.* Vallejo, 48 Cal. 70.

"If we understand the drift of their argument, they assume the act has provided two distinct forums, or tribunals, in which cases of this kind may be prosecuted, one being a court, and the other a judge, and that a suit having been commenced before one, can not, for any purpose, be regarded as pending before the other. This is not stated in so many words, but it is what seems to be the purport or effect of the argument. While the expression, 'court or judge,' which runs through most of the sections in the act, seems to give color to this view, and while the act unquestionably contemplates some diversity in the procedure depending upon whether it is commenced in term time or in vacation, nevertheless, the proceeding in either case must, in contemplation of law, be regarded as pending in court. The judge, as a mere individual, has no power to hear and determine any cause involving the exercise of judicial power, nor is it competent for the legislature to clothe him with it. The organic law of the state has disposed of the whole judicial power of the government by investing it in certain courts specifically mentioned in the constitution, and the legislature, therefore, has none to confer upon any one. It can only establish or provide, by appropriate legislation, for the organization of such courts as the constitution has expressly provided for, and when so organized or established, they derive their powers directly from the people, in their organized political capacity, through the constitution. Courts are political agencies—mere legal entities—established under the constitution for governmental purposes, and in contemplation of law have a separate existence distinct from the judges who preside over them; otherwise, when the judge of a court dies, the court itself would cease. A judge, therefore, has no judicial power outside of the court in which he officiates. He is the tangible, living oracle of the court. He speaks and acts for it, and in law is its only accredited agent. When discharging the judicial functions of his office, he is the court in concrete form, and in this sense he is often called the court, but strictly and technically speaking, the judge and the court are wholly distinct. To every lawyer these general propositions are so palpably true, they require no illustrations or authorities to support them. The People *v.* Maynard, 14 Ill. 419; Field *v.* The People, 2 Scam. 181." Bowman *v.* Venice, etc., Ry. Co., 102 Ill. 459, 467.

[2] In re Stevens, 83 Cal. 322, 333; 23 Pac. Rep. 379.

tion of a different court and taken from such court by statute.[1]

The question as to the power of other than judicial officers or courts to punish for contempt has frequently arisen, and it has generally been held that a legislative body does not possess general jurisdiction to punish for contempt, unless such power is expressly given by the constitution, or is necessarily implied from those constitutional functions and duties to the proper performance of which it is essential.[2] And statutes attempting to confer such general power are unconstitutional.[3]

But, where the statute confers only such powers as are necessary or appropriate to enable such legislative body to perform its constitutional functions it is not in contravention of the constitution.[4]

[1] Young *v.* Ledrick, 14 Kan. 92, 99.

[2] Kilbourn *v.* Thompson, 103 U. S. 168; People *v.* Keeler, 99 N. Y. 463, 475; Keeler *v.* McDonald, 2 N. E. Rep. 615; Burnham *v.* Morrissey, 80 Mass. (14 Gray) 226, 239; 74 Am. Dec. 676.

[3] People *v.* Keeler, 99 N. Y. 463, 479; 2 N. E. Rep. 615.

[4] People *v.* Keeler, 99 N. Y. 463, 480; Keeler *v.* McDonald, 2 N. E. Rep. 615.

"The Constitution of the United States declares, in terms, that the judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the congress may, from time to time, order and establish. Although no similar declaration is contained in the constitution of this state, still it is a recognized principle that, in the division of power among the great departments of government, the judicial power has been committed to the judiciary, as the executive power has been committed to the executive department, and the legislative to the legislature, and that body has no power to assume the functions of the judiciary to determine controversies among citizens, or even to expound its own laws so as to control the decisions of the courts in respect to past transactions. People *v.* Supervisors, 16 N. Y. 432. To declare what the law shall be, is a legislative power; to declare what it is or has been, is judicial. Thompson, J., in Dash *v.* Van Kleeck, 7 Johns. 498. But, notwithstanding this general division of powers, certain powers in their nature judicial are, by the express terms of the constitution, vested in the legislature. The power of impeachment is vested in the assembly. Each house is made the judge of the qualification and election of its own members. The power of removal of certain judicial officers for cause is given by the constitution to the senate and assembly, and may involve inquiries judicial in their nature, and by statute certain other officers may be removed by the senate on recom-

A judge elected or appointed under a constitutional provision fixing his term of office, can not be deprived of his office by act of the legislature.[1]

Provision is made in many of the states for the appointment or election of a special judge, in case of the disqualification or inability of the regular judge, and such statutory provisions are usually held to be constitutional.[2] But there are cases holding to the contrary.[3]

55. Power of legislature to impose other than judicial duties on judges. We have seen that judicial duties and functions can be performed only by judges or courts.[4]

mendation of the governor. 1 R. S. 123, sec. 41. I think it would be going too far to say that every statute is necessarily void which involves action on the part of either house, partaking in any degree of a judicial character, if not expressly authorized by the constitution. Where the statute relates to the proceedings of the legislative body itself, and is necessary or appropriate to enable it to perform its constitutional functions, I can not regard it as such an invasion of the province of the judiciary as should bring it within any implied prohibition of the state constitution. That instrument contains no express provision declaring any of the privileges of the members of either house, except that for any speech or debate in either house, the members shall not be questioned in any other place. Even the privilege of exemption from arrest during the sessions, is not declared. No power to keep order or to punish members or others for disorderly conduct, or to expel a member, is contained in the state constitution, as it is in the Constitution of the United States. All these matters are in this state left under the regulations of the statutes, and there is not even express authority to enact such statutes. 1 R. S., chap. 7, tit. 2. The necessity of the powers mentioned is apparent, and is conceded in all the authorities (see Cooley's Const. Lim. 133), yet it is equally apparent that statutes upon the subject must authorize some action partaking of a judicial character. If that feature is a fatal objection, it annuls all the statutory provisions in which it appears." People *v.* Keeler, 99 N. Y. 463, 480; Keeler *v.* McDonald, 2 N. E. Rep. 615.

[1] People *v.* Dubois, 23 Ill. 498; People *v.* Bangs, 24 Ill. 184; State *v.* Leonard, 2 Pickle (Tenn.), 485; 7 S. W. Rep. 453; People *v.* Garey, 6 Cow. (N. Y.) 642, 645. But see People *v.* Morrell, 21 Wend. (N. Y.) 563.

[2] *Post*, sec. 61; The State *v.* Williams, 14 W. Va. 851; Brown *v.* Buzan, 24 Ind. 194.

[3] *Ante*, sec. 28; Van Slyke *v.* Trempealeau Co. F. Ins. Co., 39 Wis 390; 20 Am. Rep. 50.

[4] *Ante*, secs. 29, 54.

It is equally well settled that judges, as such, can not be compelled to perform other than judicial duties.[1]

[1] Houston *v.* Williams, 13 Cal. 24; 73 Am. Dec. 565; Vaughn *v.* Harp, 49 Ark. 160; 4 S. W. Rep. 751; In re Griffiths, 118 Ind. 83; 20 N. E. Rep. 513; Ex parte Gans, 17 Fed. Rep. 471.

"If the act assumed to require the judges of the supreme court to perform the duties of the clerk by preparing entries, or to discharge the duties of the sheriff by preparing returns for him, we suppose no one would hesitate to declare it void. The fact that the officer whose duties the act assumes to direct the judges to perform is the reporter, and not the clerk or the sheriff, can make no difference. Neither shade nor semblance of difference can be discerned by the keenest vision between the cases instanced by way of illustration and the real case. The principle which rules is this: Judges can not be required to perform any other than judicial duties. This is a rudimental principle of constitutional law. To the science of jurisprudence, it is as the axiom that the whole is equal to all its parts is to the science of mathematics. There is no contrariety of opinion upon this subject. There is no tinge of reason for asserting a different doctrine. We quote Judge Cooley's statement of the principle, although it is found in a book intended for beginners, because it expresses the rule clearly and tersely. This is his statement: 'Upon judges, as such, no functions can be imposed except those of a judicial nature.' Principles of Const. Law, 53.

"The authorities upon this point are many and harmonious. Hayburn's case, 2 Dall. 409, n.; U. S. *v.* Ferreira, 13 How. 40, n.; Auditor *v.* Railroad Co., 6 Kan. 500; Supervisors of Election, 114 Mass. 247; Rees *v.* City, 19 Wall. 107; Heine *v.* Commissioners, Id. 655; Smith *v.* Strother, 8 Pac. Rep. 852; Burgoyne *v.* Supervisors, 5 Cal. 9; People *v.* Town, 6 Cal. 143; Hardenburgh *v.* Kidd, 10 Cal. 402; McLean *v.* Bank, 81 Ky. 254; State *v.* Young, 29 Minn. 429; 9 N. W. Rep. 737; Shepard *v.* City, 4 S. E. Rep. 635.

"The preparation of the syllabi is an essential part of the reporter's work. Head-notes may be copyrighted, but the opinions of the court can not be. The syllabi or head-notes may be copyrighted, because they are the work of the reporter, and not of the judges. The work is essentially and intrinsically ministerial, and therefore can not be performed by the judges or the court. The soundness of the rule stated by Judge Cooley is beyond controversy, and it is hardly necessary to go further, since it is conclusive here. . . .

"It is our judgment that the petition brings before us these three questions: (1) Can the legislature impose ministerial duties upon the court? (2) Can the legislature add duties to those devolved upon the judges by the constitution? (3) Can the legislature, in violation of the constitutional inhibition, authorize the judges to discharge the essential duties of a reporter? Upon these questions, we express our judgment, and sustain the petitioner's contention; but we neither express nor in-

But in this judges and courts differ in that judges may perform purely ministerial functions, although not bound to do so because the legislative branch of the government has attempted to impose such duties upon them.[1]

So a judge may be chosen to act as an arbitrator, but in such a case he does not act as a judicial officer, and his decision is not a judgment.[2]

But, as a rule, while such duties may be performed by a judge, he is not only not bound to perform them, but if he does, he does not, in so doing, perform judicial functions. The nature of the act, if ministerial, is not changed by the fact that it is done by a judicial officer.[3]

And under the constitutions of some of the states which not only sever the executive, legislative, and judicial departments of the government, but forbid the officers of one department to perform any of the duties pertaining to another department, it is held that a judge can not, even where he consents to do so, perform any of the duties pertaining to other than the judicial department.[4] And the rule seems to be the same whether the constitution expressly forbids the act or not.[5]

In some of the cases, these constitutional limitations have been held to apply not only to the departments of *state* government, but to local municipal governments as well.[6] But the great weight of authority and reason is undoubtedly the other way.[7]

timate an opinion upon any others, although others are discussed." In re Griffiths, 118 Ind. 83; 20 N. E. Rep. 513.

[1] In re Stevens, 83 Cal. 322; 23 Pac. Rep. 379.

[2] United States *v.* Ferreira, 13 How. 40.

[3] *Ante*, secs. 29, 54; People *v.* Bush, 40 Cal. 344; United States *v.* Ferreira, 13 How. 40.

[4] Dickey *v.* Hurlburt, 5 Cal. 343; Phelan *v.* San Francisco, 6 Cal. 532; People *v.* Sanderson, 30 Cal. 160; Smith *v.* Strother, 68 Cal. 194; 8 Pac. Rep. 852; Shepherd *v.* City of Wheeling, 30 W. Va. 479; 4 S. E. Rep. 635; Chard *v.* Harrison, 7 Cal. 113.

[5] *Ante*, sec. 54; Ex parte Gans, 17 Fed. Rep. 471.

[6] Burgoyne *v.* Board of Supervisors, 5 Cal. 9; Phelan *v.* San Francisco, 6 Cal. 531.

[7] People *v.* Provines, 34 Cal. 520; Staude *v.* Election Commissioners, 61 Cal. 313, 322; Santo *v.* The State, 2 Ia. 165, 220; 63 Am. Dec. 487.

After a thorough review of the earlier California cases holding to the

Therefore, it is not unusual for the legislature to impose upon inferior tribunals, such as county commissioners, or boards of supervisors, police judges, and others of similar kinds, both judicial, legislative, and executive duties, and

contrary, the supreme court of that state in People *v.* Provines, *supra*, thus stated the views of the court:

"We understand the constitution to have been formed for the purpose of establishing a *state* government; and we here use the term 'state government' in contradistinction to local, or to county or municipal governments. But by this we do not intend to be understood to say that local governments are not within the general plan of the constitution, for such governments are necessary incidents to all forms of government—using that term in its most enlarged and popular sense—in use among civilized nations. What we mean to be understood as saying is, that the constitution does not, of itself—*ex proprio vigore*—create or establish any local or municipal governments; but, assuming that such governments will be required, provides that they shall be created and established by the legislature, and there drops the subject. 'The legislature shall establish a system of county and town governments, which shall be as nearly uniform as practicable throughout the state.' Sec. 4, Art. XI. 'It shall be the duty of the legislature to provide for the organization of cities and incorporated villages, and to restrict their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit, so as to prevent abuses in assessments and in contracting debts by such municipal corporations.' Sec. 37, Art. IV. 'Each county, town, city, and incorporated village shall make provision for the support of its own officers, subject to such restrictions and regulations as the legislature may prescribe.' Sec. 9, Art. XI. These provisions show very clearly that the creation and regulation of local and subordinate governments, such as county, city, and town governments, is not attempted in the constitution; and that the whole subject of local and subordinate governments is, by that instrument, turned over to one branch of the government, which it provides and defines with certain admonitions only for its guidance. When, therefore, the constitution is speaking of the 'powers of government,' and engaged in the work of distributing them to different departments, and securing absolute independence to each department by providing that each shall be worked and managed by a different set or class of individuals, of what government is it talking? Certainly not of town, city, village, or county governments, which it does not undertake to organize, which are not being established, but are to be established hereafter by a body which the constitution is at the time creating and organizing. Obviously it is talking about the government upon which it is at work, and it is the powers of that government alone which it is declaring, distributing, and guarding; that is to say, the state government, as contradistinguished from those which are to be hereafter created by legislative will, merely, as the incidents and auxiliaries of the

such legislation is upheld by the courts.[1] And, on the same theory and construction of the constitution, a judge of a state court may perform purely ministerial duties not belonging to the functions of one of the other departments of the *state* government.[2]

If a judge attempts to perform functions belonging to one of the other departments of government, which is forbidden by the constitution, his acts are void.[3] And an act of the legislature attempting to confer upon a judge legis-

former. The departments, therefore, of which it speaks, and in respect to which it provides that no person employed in one shall be employed in either of the other two, are the departments of the state government, as expressly defined and limited in the constitution; and its meaning is that no member of the legislative department, as there defined, shall at the same time be a member of the executive or judicial departments, as there defined, and *vice versa*. That is to say, no judicial officer shall be governor, lieutenant-governor, secretary of state, controller, treasurer, attorney-general, or surveyor-general, all of whom, and none others, in the sense of the third article of the constitution, belong to and constitute the executive department of the government; or a member of the senate or assembly, which two bodies, and none other, in the sense of the third article of the constitution, constitute the legislative department. So of each officer of the executive department—he can not belong to the judicial or legislative department. That is to say, he can hold no judicial office, nor the office of senator or member of the assembly. And so of senators and members of the assembly—they can hold no judicial or executive offices comprised within the executive and judicial departments, as defined in Articles V and VI.

"In short, the third article of the constitution means that the powers of the state government, not the local governments thereafter to be created by the legislature, shall be divided into three departments, and that the members of one department shall have no part or lot in the management of the affairs of either of the other departments, 'except in the cases hereinafter expressly directed or permitted.'"

[1] People *v.* Supervisors, 8 Cal. 58; Bixler *v.* Sacramento, 59 Cal. 698, 702; Uridias *v.* Morrill, 22 Cal. 474; Spring Valley Water-Works *v.* Bryant, 52 Cal. 132; 12 Am. & Eng. Enc. of Law, 6, 7, notes.

[2] People *v.* Provines, 34 Cal. 520. A different rule was laid down in People *v.* Sanderson, 30 Cal. 160, but this case was expressly overruled by Peoples *v.* Provines, *supra*.

[3] People *v.* Town of Nevada, 6 Cal. 143; Phelan *v.* San Francisco, 6 Cal. 531; Ex parte Siebold, 100 U. S. 371, 398; United States *v.* Ferreira, 13 How. 40; Ex parte Gans, 17 Fed. Rep. 471.

lative powers is unconstitutional and void, at least as to the parties affected by it.[1]

56. General powers and duties of judges. The general powers and duties of judges are indicated by what has been said upon the subject of constitutional limitations,[2] and of the power of the legislature to confer jurisdiction and impose duties upon them.[3] Their duties are judicial, as contradistinguished from such duties as belong to the legislative and executive departments of government, state or national.

There are certain of these duties which must be performed by the courts.[4] Others may be performed by the judge at chambers or in vacation.[5]

The general subject of jurisdiction of courts, and what is necessary to constitute the judges such courts, has been sufficiently considered in other sections.[6]

A duty imposed upon a judge, whether to be performed when acting as a court or not, must be performed by him, and can not be delegated or transferred to another person, judge, or court, to be performed.[7] And if the duty is imposed by the constitution, its performance can not be excused or transferred to another by legislative enactment.[8]

Usually the duties and powers of a judge cease with the termination of his term of office. But this is not always so. It is sometimes provided by statute that a judge may, after his term has expired, settle a bill of exceptions in a cause tried before him.[9] And he may be authorized, by statute, to sign other papers necessary to make a proper record of a decision rendered by him while in office.[10]

So the authority of a judge to act is usually confined to

[1] Smith *v.* Strother, 68 Cal. 194; 8 Pac. Rep. 852; Shepherd *v.* City of Wheeling, 30 W. Va. 479; 4 S. E. Rep. 635.

[2] *Ante*, sec. 29. [3] *Ante*, secs. 54, 55. [4] *Ante*, secs. 1, 8.

[5] *Post*, secs. 58, 59. [6] *Ante*, secs. 1, 8, 19.

[7] 12 Am. & Eng. Enc. of Law, 3; Alexander *v.* Bennett, 60 N. Y. 204.

[8] Alexander *v.* Bennett, 60 N. Y. 204. But see Anderson *v.* Reilly, 66 N. Y. 189.

[9] Oliver *v.* Town, 24 Wis. 512; Hale *v.* Haselton, 21 Wis. 325.

[10] Johnson *v.* Higgins, 53 Conn. 236; 1 Atl. Rep. 616.

the district, circuit, or county over which his jurisdiction extends.[1] But there are also exceptions to this rule. Provision is frequently made, by statute, by which one judge may act in the district of another judge, in which case he becomes for the time being the judge of the district in which he is acting, with all the authority of the presiding judge, unless his authority is limited by law, which is sometimes the case.[2]

Sometimes judges are regarded as state and not county and district officers, with power, subject to statutory limitations or restrictions, to act any where within the state.[3]

But this is a matter subject to constitutional or statutory regulation, and the authority of judges in this respect is not uniform in the different states.[4]

It is held that the power to appoint certain officers and employees may properly be conferred upon the courts or judges.[5] And this is particularly so as to its own employees.[6] But, generally, the power to appoint to office is held to be an executive one, and not within the authority of judges or courts.[7]

It has been held that an act of the legislature authorizing a judge to fix the salary of a reporter of the court, for services to be rendered, is unconstitutional, on the ground that the fixing of salaries is a legislative power.[8]

57. Power to act in another district.—As a general rule the authority of judges, as well as courts, is limited to the district, circuit, or county over which the court has jurisdiction.[9] But this is a matter that is sometimes within the control of the legislature, and provision is frequently made for the judge of one district to hold court for, and sometimes to act generally, in the place of the

[1] *Ante*, sec. 15.
[2] *Post*, secs. 57, 61.
[3] *Post*, sec. 57; Oliver *v.* Town, 24 Wis. 512.
[4] Wallace *v.* Helena Electric Ry. Co., 10 Mont. 24; 25 Pac. Rep. 278.
[5] Ex parte Siebold, 100 U. S. 371, 397.
[6] *Ante*, sec. 27; In re Janitor Supreme Court, 35 Wis. 410.
[7] *Ante*, sec. 29, p. 193.
[8] Smith *v.* Strother, 68 Cal. 194; 8 Pac. Rep. 852.
[9] *Ante*, secs. 9, 15, 56.

resident judge of another district, or provision therefor is made in the constitution.

The authority to act out of his district is sometimes held to exist without any express statutory provision for it, on the ground that judges are state officers, and may, for that reason, perform certain of their duties anywhere in the state.[1] And in some of the states this is expressly provided by statute.[2] But a different rule has been declared in some of the states.[3] And this is not generally so, and particularly where the duty to be performed is some act that must be performed by a court, and not by a judge at chambers. Therefore, provision is usually made, by the constitution or statute, for the calling in of a judge from another district where the resident judge is disqualified or unable, for any reason, to hold the court.[4] The grounds upon which this may be done, and the manner of calling such judge is considered in another section.[5] In most of the states this is provided for by the constitution.[6] But in others authority to provide for the holding of courts in the absence or inability of the resident judge to act, is given to the legislature by the constitution.[7] Authority is given to a federal district judge to hold court and perform the duties of a judge of another district, in the state, by statute, in case of a vacancy of the office of judge in such other district.[8] Under this statute it is held that the absence of the resident judge does not authorize another judge to act. There must be a vacancy in the office.[9]

[1] *Ante*, sec. 56; Oliver *v.* Town, 24 Wis. 512.

[2] State *v.* County Commissioners, 10 Pac. Rep. 901.

[3] Wallace *v.* Helena Electric Ry. Co., 10 Mont. 24; 25 Pac. Rep. 278.

[4] *Ante*, sec. 46; *Post*, secs. 61, 62. [5] *Post*, sec. 61.

[6] Eureka L. & Y. C. Co. *v.* Superior Court, 66 Cal. 311; 5 Pac. Rep. 490; Empire Land, etc., Co. *v.* Engley, 14 Colo. 289; 23 Pac. Rep. 452; Gale *v.* Richie, 47 Mo. 326; Clark *v.* Rugg, 20 Fla. 861; Bear *v.* Cohen, 65 N. Car. 511; Wallace *v.* Helena Electric Ry. Co., 10 Mont. 24; 25 Pac. Rep. 278; Daniels *v.* Towers, 79 Ga. 785; 7 S. E. Rep. 120; Munzesheimer *v.* Fairbanks, 82 Tex. 351; 18 S. W. Rep. 697.

[7] Hughes *v.* Commonwealth, 89 Ky. 227; 12 S. W. Rep. 269.

[8] Rev. Stat. U. S., sec. 603.

[9] Am. L. & T. Co. *v.* East, etc., R. Co., 40 Fed. Rep. 182.

There are other provisions for the appointment of some other judge to act, and for the transfer of business to the circuit court in case of the absence or disability of the resident judge, or a press of business requiring the aid of another judge.[1] The judge appointed by the circuit judge under these statutory provisions has the same powers that are vested by law in the judge of the district in which he is called to act both in the district and circuit courts, and with the same power and limitations as to the right to sit or act in the circuit court, in a cause appealed from the district court in which he is called to act.[2]

[1] Rev. Stat. U. S., secs. 587–602; Harmon *v.* United States, 43 Fed. Rep. 817.

[2] Rev. Stat. U. S., secs. 591, 592, 596, 614; Harmon *v.* United States, 43 Fed. Rep. 817, 818; United States *v.* Emholt, 105 U. S. 414.

"It is believed these are all the statutory provisions bearing directly on this question. These sections are to be taken together, and construed as if they were one law. So construed, the law is, that the district judge of one district, appointed to hold, and holding, a circuit court in another district, is invested with the same powers that are vested by law in the judge of the district in which the court is held, and may discharge all the judicial duties of such judge in the circuit court. In holding the circuit court, he sits as a district, and not as a circuit judge. The statute clothes him with the jurisdiction 'to discharge all the judicial duties of the judge' of the district in which the court is held, and not all the judicial duties of a circuit judge. Embarrassment may sometimes result from the present state of the law on this subject. For instance, if the district judge of the district where the court is held, and the district judge assigned to his aid sit together in the trial of a cause in the circuit court, and there is a difference of opinion between them as to any question arising in the trial of the cause, or as to what judgment shall be rendered, there is no statute declaring whose opinion shall prevail. There is indeed no statute saying in terms that they shall or may sit together. Section 592 authorizes them to 'hold separately, at the same time, a district or a circuit court;' and, by section 596, the assigned judge is authorized 'to hold a district or circuit court in the place or in aid' of the judge of the district. The statute declares whose opinion shall prevail when the court is 'held by a circuit justice and a circuit judge, or a district judge, or by a circuit judge and a district judge;' but no provision is made for a difference of opinion between two district judges. Section 650, Rev. Stat. U. S. Nor is there any provision for a certificate of division of opinion between two district judges, as there is in a case of a difference of opinion between 'a circuit justice

Statutes authorizing judges to hold courts in districts other than those for which they are elected are valid in

and a circuit judge, or a district judge, or by a circuit judge and a district judge.' Sections 652 and 693, Rev. Stat. U. S.

"It was early decided that a district judge could not sit in the circuit court on a writ of error from his own decision (U. S. *v.* Lancaster, 5 Wheat. 434), and by chapter 20 of the act of the 2d of April, 1852 (10 U. S. St. 5), embodied in section 592 of the Revised Statutes, it was enacted, in reference to judges assigned to hold court in districts other than their own, under that statute, that 'no such district judge shall hear appeals from the district court.' But by the later act of March 2, 1867 (chap. 185, sec. 2, 14 U. S. 545), it was provided that a cause appealed from the district to the circuit court might, by consent of parties, 'be heard and disposed of by the circuit court held by the district judge,' in the absence of the associate justice allotted to the district. This act, with some others, is incorporated in section 614 of the Revised Statutes. This act, the supreme court say, was enacted 'in order to prevent failure or delay of justice.' U. S. *v.* Emholt, 105 U. S. 414. Under the provisions of section 614, a district judge holding the circuit court, sitting alone, may, by consent of parties, hear and decide an appeal or writ of error from his own decision. If the district judge of the district, when holding the circuit court, may hear and decide an appeal or writ of error from the district court by the consent of the parties, undoubtedly the district judge assigned to hold the circuit court in that district may do the same. The assigned judge is, as we have seen, invested with all the powers and jurisdiction of the judge of the district. This includes the power to hear and decide, by consent of parties, any cause pending in the circuit court on appeal or writ of error from the district court. It would be a singularly anomalous condition in the law if the district judge of the district, holding a circuit court, could, by consent of the parties, hear an appeal or writ of error from his own decision in the district court, and a district judge of another district, appointed to hold the same circuit court, could not, by consent of the parties, hear appeals and writs of error from the decisions of the judge of that district. There would seem to be more reason for denying the exercise of this appellate jurisdiction to the judge who decided the case below than to one who had no previous knowledge of the same. The parties have a right to have their appeal or writ of error heard by the circuit justice or the circuit judge, and to have their cause continued until such a hearing can be had; but it is competent for them, by consent, to submit to a hearing before the district judge who tried the cause in the district court, or before a district judge assigned to hold the court 'in the place or in aid of' such judge." Harmon *v.* United States, 43 Fed. Rep. 817, 819.

the absence of any express constitutional provision against it.[1]

Where the action to be taken can only be performed by a court, it can not be done out of the district or county in which the action or proceeding is pending, whether by the resident judge or the judge of another district.[2]

It has been held, however, that a judge may sign his findings and order for judgment outside of the territorial jurisdiction of the court, on the ground that it is the filing of the same in the proper place that constitutes the decision and determination of the case.[3] And also that a judge who has been called to another district to try a cause may, with the consent of parties, hear and decide a motion for a new trial out of the district.[4]

So, a judge who is authorized to vacate injunctions in vacation may make an order therefor in a county of his circuit other than the one in which the injunction is pending.[5] And usually, mere chamber orders that may be made by the judge are not void because made in another county or district. And in some of the states, express authority to make such orders as may be made out of court without notice anywhere in the state is given by statute.[6]

Where there is but one court in a county, presided over by a single judge, two judges can not act in matters pending in such court at the same time. Therefore, a judge from another district can not make a valid order affecting a matter pending therein while court is being held by the resident judge.[7] But where the district is composed of more than one county, a special term may be held in one county by a non-resident judge while the regular

[1] People *v.* McCauley, 1 Cal. 379; Holden *v.* Haserodt, 51 N. W. Rep. 340.

[2] Bennett *v.* Southard, 35 Cal. 688.

[3] Comstock Q. M. Co. *v.* Superior Court, 57 Cal. 625.

[4] Cheesman *v.* Hart, 42 Fed. Rep. 98, 105.

[5] Hayzlett *v.* McMillen, 11 W. Va. 464; Horn *v.* Perry, 11 W. Va. 694.

[6] State *v.* Black, 34 S. Car. 194; 13 S. E. Rep. 361, 364.

[7] People *v.* O'Neil, 47 Cal. 109.

term is being held in another county by the resident judge.[1]

Where a cause is tried by the judge of another district, it will be presumed, in the absence of any showing in the record to the contrary, that such judge was properly called to preside, and that sufficient reason therefor existed.[2]

In calling a judge from another district to preside, the law authorizing it must be complied with. But where such a proceeding is authorized by law and such judge is actually called, the question whether he was properly called can not be raised collaterally.[3]

It has been held that, under a constitutional provision authorizing a judge to "hold court" in another district, such judge has no power or authority to perform the general duties of the office of judge in the district to which he is called, and that therefore he can not make valid orders at chambers.[4] So it is held that authority given to call a judge to hold a term of court does not authorize such judge to be called to hold a part of a term or to try a particular case.[5] But where the constitution authorizes a judge to "hold court" in another district, and does not forbid his performing any other duty, an act of the legislature extending his authority to other acts, either in such other district or in his own district to take effect in the other, is not unconstitutional.[6] And in most of the states, the judge who is called in takes the place of the resident judge, and assumes and performs all of the duties pertaining to the office, unless his appointment and authority to act is limited to some specific duties. The authority of

[1] Munzesheimer *v.* Fairbanks, 82 Tex. 351; 18 S. W. Rep. 697.

[2] People *v.* Mellon, 40 Cal. 648, 655; Empire Land, etc., Co. *v.* Engley, 14 Colo. 289; 23 Pac. Rep. 452; Daniels *v.* Towers, 79 Ga. 785; 7 S. E. Rep. 120.

[3] *Post*, secs. 60, 61; People *v.* Mellon, 40 Cal. 648, 655.

[4] Wallace *v.* Helena Electric Ry. Co., 10 Mont. 24; 24 Pac. Rep. 626; 25 Pac. Rep. 278.

[5] Gale *v.* Michie, 47 Mo. 326.

[6] Holden *v.* Haserodt, 51 N. W. Rep. 340. See also Hughes *v.* Commonwealth, 89 Ky. 227; 12 S. W. Rep. 269.

the resident judge is, for the time being, wholly suspended, and no action can be taken by him.[1]

As has been said, however, this question must necessarily turn upon the provisions of the constitutions or statutes, as the case may be, of the different states. And the cases cited turn mainly upon the language used in the law of each state authorizing the exercise of jurisdiction by a judge out of his district.

A bill of exceptions must be settled and signed by the judge who tried the cause, although such judge is a non-resident and has returned to his own district.[2] And the resident judge may settle and sign a bill of exceptions out of the circuit or district for which such judge was elected and in which the cause was tried.[3]

A judge can exercise no judicial functions out of the state. His authority is defined by the constitution and laws of the state, which can have no extra-territorial operation.[4]

58. Authority at chambers. A difference is almost universally recognized between such duties as must be performed by a court and those which may be performed by a judge. Generally, all acts that are required to be done by a court must be done in term time and when the judge is, or, if the court is composed of more than one judge, a majority of the judges are, in attendance, at the time and in the place provided by law and duly and legally organized as a court.[5] But exceptions to this rule

[1] Clark *v.* Rugg, 20 Fla. 861; Bear *v.* Cohen, 65 N. Car. 511; Hughes *v.* Commonwealth, 89 Ky. 227; 12 S. W. Rep. 269; Morriss *v.* Virginia Ins. Co., 85 Va. 588; 8 S. E. Rep. 383.

[2] Empire Land, etc., Co. *v.* Engley, 14 Colo. 289; 23 Pac. Rep. 452; King Co. *v.* Hill, 1 Wash. St. 63; 23 Pac. Rep. 926.

[3] Oliver *v.* Town, 24 Wis. 512. [4] Payless *v.* Price, 31 N. E. Rep. 88.

[5] *Ante*, secs. 1, 19; State *v.* County Com'rs, 10 Pac. Rep. 901, 909; Washington & I. R. Co. *v.* Coeur D'Alene Ry. & Nav. Co., 28 Pac. Rep. 394; Laroo *v.* Casaneuava, 30 Cal. 561, 564; Norwood *v.* Kenfield, 34 Cal. 329; Bowman *v.* Venice, etc., Ry. Co., 102 Ill. 459, 467; Newman *v.* Hammond, 46 Ind. 119; Conkling *v.* Ridgely, 112 Ill. 36; 54 Am. Rep. 204; Ling *v.* King, 91 Ill. 571.

have apparently been made, by statutes, in some states. Thus a judge is sometimes authorized to decide a case and enter judgment therein at chambers and in vacation.[1]

Such statutes, however, are exceptional and rare. They have been upheld where there is no constitutional provision withholding the power.[2] But, by the provisions of most of the state constitutions at the present day, such jurisdiction can only be exercised by courts, and not by judges.

The dividing line between such orders and other acts as may be made and performed by a judge at chambers and those which must be made or done by a court regularly sitting as such, can not be clearly and definitely defined or traced.[3]

So the acts that may be done at chambers are usually provided for specially by statute. And, under some of the decisions, they must be, as it is held that a judge at chambers has only such power and authority to transact judicial business as are expressly conferred upon him by statute.[4]

Jurisdiction at chambers is incidental to the jurisdiction of the court itself, and can only be exercised by the judge in a matter over which the court has jurisdiction.[5] And,

[1] State *v.* Meyers, 44 Ia. 580; McLane *v.* Granger, 74 Ia. 152; 37 N. W. Rep. 123; Brewster *v.* Hartley, 37 Cal. 15; 99 Am. Dec. 237.

[2] Brewster *v.* Hartley, 37 Cal. 15, 23; 99 Am. Dec. 237.

[3] Walters *v.* Anglo-American Mortgage and Trust Co., 50 Fed. Rep. 316, 317; *ante*, sec. 19.

[4] Laroo *v.* Casaneuava, 30 Cal. 561, 564; Norwood *v.* Kenfield, 34 Cal. 329; Ellis *v.* Karl, 7 Neb. 381; Ferger *v.* Wesler, 35 Ind. 53.

[5] Pittsburgh, Ft. W. & C. Ry. Co. *v.* Hurd, 17 Ohio St. 144; Walters *v.* Anglo-American Mortgage and Trust Co., 50 Fed. Rep. 316.

"It is claimed that the 18th section of the 4th article of the constitution authorizes the legislature to confer upon a single judge of this court the jurisdiction, the exercise of which is now invoked. That section reads thus: 'The several judges of the supreme court, of the common pleas, and of such other courts as may be created, shall, respectively, have and exercise such power and jurisdiction, *at chambers, or otherwise*, as may be directed by law.'

"This section divides the powers which may be conferred by law on the several judges into two classes; according as its subject-matter makes it

where judicial power is vested by the constitution in courts, it can not be exercised by a judge at chambers, under an act of the legislature attempting to authorize it, or otherwise.[1]

a jurisdiction to be exercised 'at chambers,' or to be exercised '*otherwise.*'

"The phrase '*at chambers*' is a technical one. The term 'chambers' is thus defined by Burrill: 'The office or private rooms of a judge, where the parties are heard and orders made, in matters not requiring to be brought before the full court, and where costs are taxed, judgments signed, and similar business transacted.' Burrill's L. Dic. And thus by Bouvier: 'When a judge decides some interlocutory matter, which has arisen in the course of the cause, out of court, he is said to make such decision at his chambers.' Bouvier's L. Dic.

"This phrase, as used in the constitution, is to be understood in this, its ordinary, sense. And we are clearly of opinion that the jurisdiction now invoked, and which is supposed to have been conferred by statute, is one to be exercised, if at all, 'at chambers.' For, a single judge of this court is asked, out of court, to dissolve an injunction now subsisting in a cause still pending in the court of common pleas. An order thus made out of court, in a cause pending in a court, is, *ex vi termini*, the exercise of jurisdiction 'at chambers,' and not 'otherwise.' Now, the provision of the constitution is, that the several judges of this court shall have and exercise such power and jurisdiction at chambers as may be directed by law; and the question arises, whether a capacity is thereby conferred on the members of this court to receive at the hands of the legislature a chamber jurisdiction in causes pending in other courts, of which the judges of this court are not members. We all concur in answering this question in the negative. Jurisdiction at chambers is incidental to and grows out of the jurisdiction of the court itself. It is the power to hear and determine, out of court, such questions arising between the parties to a controversy as might well be determined by the court itself, but which the legislature has seen fit to intrust to the judgment of a single judge, out of court, without requiring them to be brought before the court in actual session. It follows, that the jurisdiction of a judge at chambers can not go beyond the jurisdiction of the court to which he belongs, or extend to matters with which his court has nothing to do. And the constitution, in granting such jurisdiction at chambers to the judges of the several courts of the state as may be directed by law, is to be understood as limiting the jurisdiction of each to such subject-matters as are within the jurisdiction of his proper court, and to which it is, *ex vi termini*, limited." Pittsburg, Ft. W. & C. R. Co. *v.* Hurd, 17 Ohio St. 144, 146.

[1] *Ante*, secs. 19, 57; *post*, sec. 59; Bowman *v.* Venice, etc., Ry. Co., 102 Ill. 459, 467; Spencer Creek Water Co. *v.* Vallejo, 48 Cal. 70; Ferger *v.* Wesler, 35 Ind. 53; Newman *v.* Hammond, 46 Ind. 119.

But by long-established usage, at common law, and independently of legislative authority, the judges of the courts of general jurisdiction exercised extensive jurisdiction at chambers.[1] This applies to courts of equity and, therefore, to the federal courts and judges acting in chancery suits.[2] And it is held that under a state constitution conferring general jurisdiction, the judges take the powers of judges of such courts at common law, including the power possessed by them at chambers, at the time the constitution was adopted.[3]

This general usage, giving judges of courts of general common law or equity jurisdiction power to act at chambers, has no application to special powers granted by statute.[4]

A constitutional provision authorizing a judge to "hold court" in another district has been held not to authorize him to exercise the powers of the resident judge at chambers.[5] But usually a judge authorized to act in another

[1] 12 Am. & Eng. Enc. of Law, 16; Conroe *v.* Bull, 7 Wis. 408, 412; In re Kindling, 39 Wis. 35, 58.

[2] "For many purposes the circuit courts of the United States, as courts of equity, are always open. Equity Rules 1, 3, 4. The authority of a judge at chambers is the authority of the court itself. Per Tindal, C. J., Doe dem. Prescott *v.* Roe, 9 Bing. 104. The practice and the jurisdiction of the judge at chambers in chancery suits is, in many instances, so intimately blended and incorporated with the practice and jurisdiction of the court that it is sometimes difficult to separate the one from the other. The exercise of chambers jurisdiction in equity cases is absolutely essential for the purpose of preventing the delay, injustice, expense, and inconvenience which must inevitably ensue if applications for relief had to be made in all cases to the court in session. A motion to discharge a receiver may be heard at chambers, upon due notice, and will be granted when it appears that he was improvidently appointed, or that there is any other sufficient reason for his discharge. Railroad Co. *v.* Sloan, 31 Ohio St. 1; Crawford *v.* Ross, 39 Ga. 44; Beach, Rec. sec. 778." Walters *v.* Anglo-American Mortgage and Trust Co., 50 Fed. Rep. 316, 317.

[3] In re Kindling, 39 Wis. 35, 58.

[4] Conroe *v.* Bull, 7 Wis. 408, 412; Spencer Creek Water Co. *v.* Vallejo, 48 Cal. 70.

[5] *Ante*, sec. 57; Wallace *v.* Helena, etc., Ry. Co., 10 Mont. 24; 24 Pac. Rep. 626; 25 Pac. Rep. 278.

district is held to possess all of the powers of the resident judge for the time being.[1] And a constitutional provision authorizing judges to "hold court" in another district does not prevent the legislature from conferring upon such judges the power to act at chambers in another district.[2]

Statutory provisions are usually enacted authorizing a judge at chambers to grant orders of arrest, mandamus, attachment, injunctions, and all orders relating thereto, to appoint and discharge receivers, and other like proceedings and writs made on ex parte application, not involving the trial of a cause on its merits and in which immediate action is necessary for the protection of litigants.[3]

A judge can not issue an injunction to operate beyond his district or the district in which he is acting.[4]

59. Authority to act in vacation.—The subject of terms of court, as affecting jurisdiction, has been considered. And what will constitute a vacation of a court received attention in that connection.[5]

The authority of judges at chambers is generally independent of terms of court, and may be exercised in vacation.[6] And, usually, no act of jurisdiction that is required to be performed by a court can be exercised by a judge in vacation.[7] But, independently of any constitutional pro-

[1] *Ante*, sec. 57; *post*, sec. 61.

[2] Holden *v.* Haserodt, 51 N. W. Rep. 340.

[3] State *v.* Shakespeare, 6 Sou. Rep. 514; Ellis *v.* Karl, 7 Neb. 381; Real Estate Ass'n *v.* San Francisco, 60 Cal. 223, 227; County Court of Gloucester Co. *v.* County Court of Middlesex Co., 14 S. E. Rep. 660; Hammack *v.* Loan and Trust Co., 105 U. S. 77.

[4] State *v.* Michaels, 8 Blackf. (Ind.) 436.

[5] *Ante*, sec. 19; Conkling *v.* Ridgely, 112 Ill. 36, 42; 54 Am. Rep. 204.

[6] *Ante*, secs. 19, 57, 58.

[7] *Ante*, secs. 19, 58; Newman *v.* Hammond, 46 Ind. 119; Ferger *v.* Wesler, 35 Ind. 53; Conkling *v.* Ridgely, 112 Ill. 36; 54 Am. Rep. 204; Ling *v.* King, 91 Ill. 571; Chase *v.* Miller, 88 Va. 791; 14 S. E. Rep. 545; Blair *v.* Reading, 99 Ill. 600, 609; Hammock *v.* Loan and Trust Co., 105 U. S. 77; Sargent *v.* Roberts, 1 Pick. 337; 11 Am. Dec. 185; Rafferty *v.* People, 72 Ill. 37, 47.

vision forbidding it, the legislature may authorize the performance of judicial duties, falling within the duties of courts, by judges, at chambers, in vacation.[1]

But such authority is almost universally denied to the judges, at the present day, by constitutional provisions.[2] And judges can not, although not prohibited from doing so by the constitution, perform the functions of a court in vacation, unless expressly authorized to do so by statute.[3]

The mere entry of a judgment is not a judicial act, and may be performed in vacation and by the clerk.[4]

Although terms of court may be provided for generally, the legislature may provide that for the transaction of business of an urgent character, the court shall be open at all times, and under such legislation, the court may act with reference to such business during what is, as to other business, vacation. But this is not the act of a judge in vacation, but of the court.[5] And where a judge is authorized to appoint a receiver or perform other like judicial acts, it is held that his acts, orders, and proceedings, although had in vacation, are the judicial proceedings of the court whereof he is judge. This, however, is based upon the ground that the words "judge" and "court" are, as used in the statute authorizing the appointment of a receiver in vacation, synonymous.[6]

[1] *Ante*, sec. 58; Brewster *v.* Hartley, 37 Cal. 15, 23; 99 Am. Dec. 237; McMurtry *v.* Tuttle, 13 Neb. 232; 13 N. W. Rep. 213; Morris *v.* Virginia Ins. Co., 85 Va. 588; 8 S. E. Rep. 383.

[2] *Ante*, sec. 58.

[3] Norwood *v.* Kenfield, 34 Cal. 329; Chase *v.* Miller, 88 Va. 791; 14 S. E. Rep. 545; Hammock *v.* Loan and Trust Co., 105 U. S. 77; Blair *v.* Reading, 99 Ill. 600, 609; 12 Am. & Eng. Enc. of Law, 14; Bynum *v.* Commissioners Burke Co., 97 N. Car. 374; 2 S. E. Rep. 170.

[4] Durham *v.* Brown, 24 Ill. 93; Ling *v.* King, 91 Ill. 571; Conkling *v.* Ridgely, 112 Ill. 36, 44; 54 Am. Rep. 204.

[5] Bowman *v.* Venice, etc., Ry. Co., 102 Ill. 459; Bynum *v.* Commissioners Burke Co., 97 N. Car. 374; 2 S. E. Rep. 170.

[6] Pressly *v.* Lamb, 105 Ind. 171, 185; 4 N. E. Rep. 682.

In this case the court said:

"When the judge of a court, in vacation, is engaged in doing these acts and making these orders, it is clear, we think, that he is exercising *quoad hoc* 'the judicial power of the state,' and that his acts, orders, and proceedings in the premises, although had in vacation, are the judicial

As a rule, all orders that may be made or proceedings had at chambers may be made or had in vacation.[1]

proceedings of the court whereof he is judge. In section 1, of article 7, of our State Constitution of 1851, as such section was amended March 14, 1881, it is provided as follows: 'The judicial power of the state shall be vested in a supreme court, in circuit courts, and in such other courts as the general assembly may establish.' Section 161, R. S. 1881.

In Shoultz *v.* McPheeters, 79 Ind. 373, after quoting this section of the constitution, the court said: 'All judicial powers are, by force of this provision, vested in the courts of the state. The legislature has no authority to invest any other tribunals than the courts with judicial powers. It is certain that the legislature can not exercise judicial powers. Columbus, etc., Ry. Co. *v.* Board, etc., 65 Ind. 427; Doe *v.* Douglass, 8 Blackf. 10; Young *v.* State Bank, 4 Ind. 301. Nor can these powers be vested elsewhere than in the tribunals designated or indicated by the constitution. Judicial powers can not be delegated.' Accordingly, it was held in the case cited, that section 1404, R. S. 1881, wherein it was attempted to confer judicial power upon master commissioners in certain cases, was unconstitutional and void. So, also, in Gregory *v.* State ex rel., 94 Ind. 384 (48 Am. R. 162), it was held, in view of the constitutional provision above quoted, that judicial power can not be conferred by statute upon the clerks of courts.

It is true, however, that, in a legal sense, the judge of a court is the court; certainly, there can be no court, under our laws, constitutional or statutory, without a judge. Rogers *v.* Beauchamp, 102 Ind. 33; Shoultz *v.* McPheeters, *supra*. So nearly akin are the two words, 'court' and 'judge,' in legal parlance, that, as they are used in the sections of the code now under consideration, they may well be regarded as synonyms, each of the other. Michigan, etc., R. R. Co. *v.* Northern Ind. R. R. Co., 3 Ind. 239, on p. 245.

It is in this legal sense, we think, that the words 'judge thereof in vacation,' so often mentioned in the sections of the code before referred to, relating to receivers, should be taken and understood to mean 'court in vacation.' In other words, the phrase, 'the court, or the judge thereof in vacation,' so often found in those sections, by supplying or filling a manifest ellipsis and the interchange of synonyms, may be made to read, in strict accordance with the legislative intent, and in perfect harmony with the constitutional provision above quoted, as follows: The court when in lawful session, or the court in vacation; or thus: The judge in term, regular, adjourned, or special, or the judge in vacation."

See, also, on this point, McMurtry *v.* Tuttle, 13 Neb. 232; 13 N. W. Rep. 213.

[1] *Ante*, sec. 58; Hayzlett *v.* McMillan, 11 W. Va. 464; Horn *v.* Perry, 11 W. Va. 694.

As to what orders may be made at chambers, see *ante*, sec. 58.

60. De jure and de facto judges. The subject of *de facto* courts, which bears upon the question now to be taken up, has been touched upon in another section.[1]

An officer *de facto* is one who is claiming the right to hold the office and is performing the duties thereof under such claim, either under color of title or with the knowledge and acquiescence of the public.[2]

It will be seen that most of the definitions given of an officer *de facto* exclude the element of color of right or

[1] *Ante*, sec. 28.

[2] "An officer *de facto* is one who has the reputation of being the officer he assumes to be and yet is not a good officer in point of law." Parker *v.* Kett, 1 Ld. Raym. 658; Cromer *v.* Boinest, 27 S. Car. 436; 3 S. E. Rep. 849; Hamlin *v.* Kassafer, 15 Or. 456; 15 Pac. Rep. 778; Ex parte Strang, 21 Ohio St. 610, 617.

"An officer *de facto* is one who exercises the duties of an officer under color of an appointment or election to that office, or who has the reputation of being the officer he assumes to be. He differs, on the one hand, from a mere usurper of an office, who undertakes to act as an officer without color of right; and, on the other, from an officer *de jure*, who is, in all respects, legally appointed and qualified to exercise the office." 12 Am. & Eng. Enc. of Law, 23.

"A definition sufficiently accurate and comprehensive to cover the whole ground must, I think, be substantially as follows: An officer *de facto* is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid so far as they involve the interests of the public and third persons, where the duties of the office were exercised:

"First, without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people, without inquiry, to submit to or invoke his action, supposing him to be the officer he assumed to be.

"Second, under color of a known and valid appointment or election, but where the officer had failed to conform to some precedent, requirement, or condition, as to take an oath, give a bond, or the like.

"Third, under color of a known election or appointment, void because the officer was not eligible, or because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in its exercise, such ineligibility, want of power, or defect being unknown to the public.

"Fourth, under color of an election or appointment by or pursuant to a public unconstitutional law, before the same is adjudged to be such.

"Any thing less comprehensive and discriminating will, I think, be imperfect and deceptive as a definition." State *v.* Carroll, 38 Conn. 449; 9 Am. Rep. 409; State *v.* Lewis, 107 N. Car. 967; 12 S. E. Rep. 457.

title as being absolutely requisite, and the weight of the decisions seems to be that it is not requisite.[1]

The better rule seems to be that the party who relies

[1] "The question as to what will constitute a *de facto* officer has been the subject of judicial inquiry in very many cases, both in England and in this country, and, while it must be admitted that there is some conflict of opinion, it seems to us that the weight of authority, as well as argument, is against the view contended for by the appellant. According to that view, as we understand it, the mere fact that one is found in the exercise of the duties of an office, without question of his authority as such, is not sufficient to constitute him a *de facto* officer, unless he is in such office by some color of right or title, even though he may be apparently invested with all the insignia of office.

"The *de facto* doctrine rests upon considerations of public policy and necessity. It was introduced into the law for the purpose of protecting the interests of the public, as well as those of private individuals, where those interests were involved in the official acts of one who may be found exercising the duties of an office, though without lawful authority. Hence, where a person is called upon to deal with such an officer, he is not bound to inquire whether his title to the office is good; and for a like reason it seems to us that he should not be required to inquire whether such title is colorable. In fact, he is not called upon to inquire into the title of such an officer at all, but may safely assume that he is what he appears to be, and what the public generally regard him to be. As said by Devens, J., in Petersilea *v.* Stone, 119 Mass. 465; 20 Am. Rep. 335, 'third persons, from the nature of the case, can not always investigate the right of one assuming to hold an important office, even so far as to see that he has color of title to it by virtue of some appointment or election.'

"The case of State *v.* Carroll, 38 Conn. 449; 9 Am. Rep. 409, seems to be a leading case upon the subject. There, Butler, C. J., subjects the authorities, both English and American, to an elaborate review, and shows that the idea that there must be some color of right, derived from some election or appointment, in order to constitute one a *de facto* officer, is without foundation, and is based upon what he characterizes as 'a brief, inaccurate, and deceptive report' of the case of Rex *v.* Lisle, 2 Strange, 1090, as is shown by a fuller and more accurate report of the same case in Andrews, 163. On the contrary, he adopts the definition of a *de facto* officer given by Lord Ellenborough, in Rex *v.* Bedford Level, 6 East, 356, generalized from a previous definition given by Lord Holt, in Parker *v.* Kett, 1 Ld. Raym. 658, as follows: 'An officer *de facto* is one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law;' which definition, he says, 'has never been questioned since, in England, and is now the rule there.'" Cromer *v.* Boinest, 27 S. Car. 436; 3 S. E. Rep. 849.

upon the acts of one assuming to be a judge is not bound to show that he acted under color of title to the office[1].

He has the right to assume that one acting in such a capacity is acting lawfully, and is what he appears to be, and what the public generally regard him to be, and that, if he so acts, and his acts are acquiesced in by the public, litigants will be bound thereby.[2]

It will be found that a distinction is recognized, in some of the cases, in respect to the necessity of showing color of title, between a case where the party assuming the right to act is concerned, and where the question arises between third parties affected by his acts. It being held that in the former case color of right must be shown, while in the latter it is unnecessary.[3]

In some of the definitions given in the notes below, the element of reputation is included as necessary to constitute the party assuming to act as a *de facto* officer where color of title does not appear. In these cases the reputation acquired by the actual performance of the duties of the office acquiesced in by the public, takes the place of the color of title required in other cases.[4]

One acting under appointment of one having a colorable right to make the appointment is a *de facto* officer.[5] Not only so, but an appointment to an officer by one who has no authority whatever to make the appointment is held to give color of title, and to constitute the person acting under it an officer *de facto*.[6] So where one is elected

[1] Cromer *v.* Boinest, 27 S. Car. 436; 3 S. E. Rep. 849.

[2] Petersilea *v.* Stone, 119 Mass. 465; 20 Am. Rep. 335; State *v.* Carroll, 38 Conn. 449; 9 Am. Rep. 409; Ex parte Strang, 21 Ohio St. 610, 617; Hamlin *v.* Kassafer, 15 Or. 456; 15 Pac. Rep. 778.

[3] Petersilea *v.* Stone, 119 Mass. 465; 20 Am. Rep. 335; Conover *v.* Devlin, 15 How. Pr. 470, 477.

[4] Conover *v.* Devlin, 15 How. Pr. 470, 477; Brown *v.* Lent, 37 Me. 428; Ex parte Strang, 21 Ohio St. 610, 617; Hamlin *v.* Kassafer, 15 Ore. 456; 15 Pac. Rep. 778.

[5] Ex parte Strang, 21 Ohio St. 610.

[6] State *v.* Bloom, 17 Wis. 521; Laver *v.* McGlachlin, 28 Wis. 364 State *v.* Lewis, 107 N. Car. 967; 12 S. E. Rep. 457

judge before the law authorizing such election takes effect, and enters upon the duties of the office.[1]

The mere exercise of the duties of the office, without color of right, or acquiescence therein by the public, can not render one an officer *de facto*. He is a mere usurper and his acts are void. And if one does not assume or claim to act as judge, but in some other capacity not entitling him to perform judicial functions, he is not a judge *de facto*.[2] But the authority is given in some of the states to appoint an attorney to act, temporarily, and perform the duties of judge. These statutes, and the powers of such special judges will be considered in another section.[3]

The attorney so appointed can not be regarded as a judge *de facto*. He is not acting under a claim to hold and exercise the duties of the office of judge or to have other powers or authority than those actually vested in him by appointment. He is therefore a *de jure* and not a *de facto* officer. And under the statutes mentioned, he is in legal effect the judge of the court in fact, so far as his appointment extends, and such appointment vests him with the powers of a judge.

But it is held that an attorney irregularly appointed judge *pro tem.*, where such appointment is authorized by statute, is a judge *de facto*.[4]

There can be no judge *de jure* or *de facto* if there is no court or office of judge.[5] Therefore the acts of one assuming to act as the judge of a pretended court having no existence, are void, and may be attacked collaterally.[6]

[1] In re Boyle, 9 Wis. 264.

[2] *Ante*, sec. 28; Van Slyke *v.* Trempealeau F. M. F. Ins. Co., 39 Wis. 390; 20 Am. Rep. 50; Houghland *v.* Creed, 81 Ill. 506.

[3] *Post*, sec. 61.

[4] *Post*, sec. 61; Hunter *v.* Furgeson, 13 Kan. 462, 474; State *v.* Murdock, 86 Ind. 124.

[5] *Ante*, sec. 28; People *v.* Toal, 85 Cal. 333, 338; 24 Pac. Rep. 603; People *v.* White, 24 Wend. (N. Y.) 520, 539; Walcott *v.* Wells, 24 Pac. Rep. 367, 370; Norton *v.* County of Shelby, 118 U. S. 400; 6 Sup. Ct. Rep. 1121, 1125; Carleton *v.* People, 10 Mich. 259; Hildreth *v.* McIntere, 1 J. J. Marsh. (Ky.) 206.

[6] *Ante*, sec. 28; People *v.* Toal, 85 Cal. 333, 338; 24 Pac. Rep. 603; Norton *v.* County of Shelby, 118 U. S. 400; 6 Sup. Ct Rep. 1121.

It is otherwise where one is acting as judge of an existing court and claiming to be such judge under a colorable title to the office, or other circumstances constituting him judge *de facto*. His acts are not void, or even voidable, on collateral attack. His acts are as valid and binding upon litigants as the acts of a *de jure* judge.[1] And the only remedy is a direct action against him to oust him him from the office or to contest his right to hold it.[2] But the question whether he is a *de facto* judge or a mere intruder may be determined collaterally.[3]

Usually the action to remove him must be by *quo warranto* in the name of the state. But in some of the states a statutory proceeding, in the nature of *quo warranto*, is provided for as a means of contesting the title to an office. So it may, in some of the states, be accomplished by a contest of his right to the office by one claiming to be the *de jure* judge, or by an elector of the county or district.

However he may be removed from office, his powers cease from that time. But until such removal his acts are valid and binding.

It has been held that where the term of the office of judge has terminated by the constitution, on a certain day, but both the judge and his successor, in good faith and not without reason, construed the constitution as extending the term one day longer, the outgoing judge was,

[1] Ex parte Strang, 21 Ohio St. 610, 617; Keith *v.* State, 49 Ark. 439; 5 S. W. Rep. 880; Manning *v.* Weeks, 139 U. S. 504; 11 Sup. Ct. Rep. 624; Ball *v.* United States, 140 U. S. 118; 11 Sup. Ct. Rep. 761; State *v.* Bloom, 17 Wis. 521.

[2] People *v.* Sassovich, 29 Cal. 480; Hull *v.* Superior Court, 63 Cal. 174; Keith *v.* State, 49 Ark. 439; 5 S. W. Rep. 880; People *v.* Gobles, 67 Mich. 475; 35 N. W. Rep. 91; Ex parte Johnson, 15 Neb. 512; 19 N. W. Rep. 594; People *v.* Bangs, 24 Ill. 184.

[3] "While the question of strict title to an office can be inquired into and determined only by a direct proceeding, and while courts will not, in a collateral proceeding, make such investigation, they may and will make such inquiry as will establish the line between the mere intruder into an office and one holding it under some color of title, some semblance of right between him without any authority whatever." United States *v.* Alexander, 46 Fed. Rep. 728.

during said day, which was actually beyond his term, a judge *de facto*.[1]

There are other cases holding that the acts of a judge, after his term of office has expired, are valid as the acts of a *de facto* officer.[2] And that where his successor has taken the oath of office and become judge *de jure*, the outgoing judge, not having knowledge of the fact, and his successor not having taken actual possession of his office, his acts are those of a *de facto* judge.[3] But not where the successor has assumed and is performing the duties of the office, with the knowledge of the outgoing judge, or with the general knowledge of the public.[4]

Where one who has been regularly appointed or elected to an office fails to comply with some subsequent condition necessary to qualify him therefor, as for example, the giving of a bond, the office is not vacated by a failure to comply with such condition, nor is he a *de facto* officer merely. He is a rightful officer holding by a defeasible title, and his acts are valid until his right to the office is forfeited by a direct action by the state.[5] But this depends upon the language of the statute, which may render the office vacant, by the mere failure to perform the condition, without action.[6]

An appointment under an unconstitutional statute, purporting to authorize an appointment to an existing office, before such statute is judicially declared to be unconstitutional, gives color of title to the office.[7] But, as we have seen, this is not so where the statute attempting to create the office is unconstitutional.[8]

[1] Merced Bank *v.* Rosenthal, 31 Pac. Rep. 849.

[2] Comer *v.* Boinest, 27 S. Car. 436; 3 S. E. Rep. 849; Carli *v.* Rhener, 27 Minn. 292; 7 N. W. Rep. 139; United States *v.* Alexander, 46 Fed. Rep. 728.

[3] Carli *v.* Rhener, 27 Minn. 292; 7 N. W. Rep. 139.

[4] United States *v.* Alexander, 46 Fed. Rep. 728.

[5] Foot *v.* Stiles, 57 N. Y. 399, 403. But see State *v.* Carroll, 38 Conn. 449; 9 Am. Rep. 449.

[6] People *v.* Taylor, 57 Cal. 620.

[7] Ex parte Strang, 21 Ohio St. 610, 617; Walcott *v.* Wells, 24 Pac. Rep. 367.

[8] "But it is contended that if the act creating the board was void, and

There may be, at the same time, a *de jure* and a *de facto* judge of the same court.[1] But there can not be either two *de jure* or two *de facto* judges at the same time.[2] Nor can

the commissioners were not officers *de jure*, they were, nevertheless, officers *de facto*, and that the acts of the board as a *de facto* court are binding upon the county. This contention is met by the fact that there can be no officer, either *de jure* or *de facto*, if there be no office to fill. As the act attempting to create the office of commissioner never became a law, the office never came into existence. Some persons pretended that they held the office, but the law never recognized their pretensions, nor did the supreme court of the state. Whenever such pretensions were considered in that court, they were declared to be without any legal foundation, and the commissioners were held to be usurpers. The doctrine which gives validity to acts of officers *de facto*, whatever defects there may be in the legality of their appointment or election, is founded upon considerations of policy and necessity, for the protection of the public and individuals whose interests may be affected thereby. Offices are created for the benefit of the public, and private parties are not permitted to inquire into the title of persons clothed with the evidence of such offices, and in apparent possession of their powers and functions. For the good order and peace of society, their authority is to be respected and obeyed until, in some regular mode prescribed by law, their title is investigated and determined. It is manifest that endless confusion would result if, in every proceeding before such officers, their title could be called in question. But the idea of an officer implies the existence of an office which he holds. It would be a misapplication of terms to call one an 'officer' who holds no office, and a public office can exist only by force of law. This seems to us so obvious that we should hardly feel called upon to consider any adverse opinion on the subject but for the earnest contention of plaintiff's counsel that such existence is not essential, and that it is sufficient if the office be provided for by any legislative enactment, however invalid. Their position is that a legislative act, though unconstitutional, may in terms create an office, and nothing further than its apparent existence is necessary to give validity to the acts of its assumed incumbent. That position, although not stated in this broad form, amounts to nothing else. It is difficult to meet it by any argument beyond this statement: An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed. . . . Numerous cases are cited in which expressions are used which, read apart from the facts of the cases, seemingly give support to the position of counsel. But, when read in connection with the facts, they will be seen to apply

[1] Carli *v.* Rhener, 27 Minn. 292; 7 N. W. Rep. 139.

[2] United States *v.* Alexander, 46 Fed. Rep. 728.

there be both a *de facto* and a *de jure* judge actually in possession or exercising the duties of the office at the same time.[1]

The rule that upholds the acts of a *de facto* judge, so far as they affect third parties and the public, is not confined to his judgments or other acts, as a court, but extends to other duties performed by him in the exercise of the powers of the office.[2]

61. Special judges.—Usually questions as to the powers and jurisdiction of special judges arise in cases where a judge is called to perform the duties and exercise the functions and jurisdiction of a judge of another district or circuit. These questions have, to a certain extent, been anticipated in previous sections bearing upon changes of venue and the powers of judges to act out of their district, at chambers, and in vacation.[3] But there are questions

only to the invalidity, irregularity, or unconstitutionality of the mode by which the party was appointed or elected to a legally existing office. None of them sanctions the doctrine that there can be a *de facto* office under a constitutional government, and that the acts of the incumbents are entitled to consideration as valid acts of a *de facto* officer. Where an office exists under the law, it matters not how the appointment of the incumbent is made, so far as the validity of his acts are concerned. It is enough that he is clothed with the insignia of the office, and exercises its powers and functions. As said by Mr. Justice Manning, of the Supreme Court of Michigan, in Carleton *v.* People, 10 Mich. 259: 'Where there is no office, there can be no officer *de facto*, for the reason that there can be none *de jure*. The county office existed by virtue of the constitution the moment the new county was organized. No act of legislation was necessary for that purpose. And all that is required when there is an office to make an officer *de facto*, is that the individual claiming the office is in possession of it, performing its duties, and claiming to be such officer under color of an election or appointment, as the case may be. It is not necessary that his election or appointment be valid, for that would make him an officer *de jure*. The official acts of such persons are recognized as valid on grounds of public policy, and for the protection of those having official business to transact.'" Norton *v.* County of Shelby, 118 U. S. 400; 6 Sup. Ct. Rep. 1121.

[1] Carli *v.* Rhener, 27 Minn. 292; 7 N. W. Rep. 139.

[2] Thus it is held that the appointment of a clerk of the court by *de facto* judges, where the power could have been exercised by judges *de jure* of the court, was valid. State *v.* Alling, 12 Ohio, 16.

[3] *Ante*, secs. 46, 57, 58, 59.

not touched by the sections referred to that call for some consideration in this connection.

Besides the judges who are called to act outside of their territorial jurisdiction, and who become, for the time being, special, as distinguished from resident or regular judges, provision is made, by statute, in many of the states, for the election or appointment of a member of the bar to perform the duties of judge in a particular case, or cases, or for a temporary period. The authority to elect or appoint an attorney to perform the duties of a judge, and his powers when appointed, depend wholly upon statutory provisions which differ in the different states.[1]

Unless some authority therefor is given by the constitution or by statute, judicial powers can not be conferred upon and legally exercised by an attorney, or any one else not a judicial officer, even by consent and agreement of the parties concerned.[2] But it has been held that where an attorney was called to preside, by agreement of the parties, during a part of the trial of a cause, and made no rulings or decision affecting the rights of the party contesting the validity of the proceedings, a mere irregularity was shown, and the proceedings were not void.[3]

In some of the states statutes authorizing the performance of judicial duties by attorneys selected for the purpose are held to be unconstitutional on the ground that by the constitution all judicial powers are vested in courts, and such courts must be composed of judges.[4] This must depend, of course, upon the provisions of the constitu-

[1] "A special judge is a member of the bar appointed or chosen to preside in the place of the regular judge, owing to the latter's absence, disqualification, or other cause; or he is a judge of another court, called in for such reasons, and is then more generally styled, perhaps, substitute judge." 12 Am. & Eng. Enc. of Law, 24.

[2] *Ante*, secs. 54, 60; Hoagland *v.* Creed, 81 Ill. 506; Van Slyke *v.* Trempealeau Co. F. M. F. Ins. Co., 39 Wis. 390; 20 Am. Rep. 50; Cobb *v.* People, 84 Ill. 511; McClure *v.* State, 77 Ind. 287; Haverly Invincible Min. Co. *v.* Howcutt, 6 Colo. 574.

[3] Fuson *v.* Commonwealth, 12 S. W. Rep. 263.

[4] Van Slyke *v.* Trempealeau Co. F. M. F. Ins. Co., 39 Wis. 390; 20 Am. Rep. 50.

tions of the different states, but a different conclusion has been reached in other states under similar constitutional provisions.[1] And such statutes have generally been upheld and are now in force in most of the states.

In some of the states express authority to provide for the appointment of special judges is given by constitution.[2] Statutes of this kind provide for appointments to be made in different ways in the different states:

By the regular judge,[3] by stipulation of the parties,[4] by the members of the bar,[5] by the clerk of the court,[6] by county commissioners,[7] by the governor,[8] by officers of the county.[9]

A judge from another district is authorized to be called in different ways:

By the governor,[10] by the regular judge,[11] by the clerk of the court.[12]

[1] State *v.* Williams, 14 W. Va. 851; Brown *v.* Buzan, 24 Ind. 194; Perkins *v.* Hayward, 124 Ind. 445; 24 N. E. Rep. 1033; Cargar *v.* Fee, 119 Ind. 536; 21 N. E. Rep. 1080.

[2] Thus, in Indiana it is provided: "The general assembly may provide by law, that the judge of one circuit may hold the courts of another circuit, in cases of necessity or convenience; *and in case of temporary inability of any judge, from sickness or other cause, to hold the courts in his circuit, provision may be made by law for holding such courts.*" Const. Ind., Art. 7, sec. 10; Shugart *v.* Miles, 125 Ind. 445; 25 N. E. Rep. 551.

[3] Walter *v.* Walter, 117 Ind. 247; 20 N. E. Rep. 148.

[4] Hunter *v.* Ferguson, 13 Kan. 462; State *v.* Sachs, 29 Pac. Rep. 446; Smith *v.* State, 24 Tex. 290; 6 S. W. Rep. 40.

[5] Royal Ins. Co. *v.* Rufer, 89 Ky. 518; 12 S. W. Rep. 1043; State *v.* Williams, 14 W. Va. 851; State *v.* Sanders, 17 S. E. Rep. 223; Smith *v.* State, 24 Tex. 290; 6 S. W. Rep. 40.

[6] Beck *v.* Henderson, 76 Ga. 360.

[7] Nebraska M'f'g Co. *v.* Maxon, 23 Neb. 224; 36 N. W. Rep. 492.

[8] Smith *v.* State, 24 Tex. 290; 6 S. W. Rep. 40.

[9] Feigel *v.* State, 85 Ind. 580.

[10] Pico *v.* Williams, 11 Pac. Rep. 600; State *v.* Lewis, 107 N. Car. 967; 12 S. E. Rep. 457.

[11] Eureka, etc., Canal Company *v.* Superior Court, 66 Cal. 311; 5 Pac. Rep. 490; King Co. *v.* Hill, 1 Wash. 63; 23 Pac. Rep. 926; People *v.* Gallagher, 75 Mich. 512; 42 N. W. Rep. 1063.

[12] Gallup *v.* Smith, 59 Conn. 354; 22 Atl. Rep. 334.

In this case the statute provided that the judge should be cited by the clerk, but the court held it to be directory, and that a citation by the judge of the court was sufficient.

Where it is provided that the judge of another district may act in case of the disqualification of the regular judge, but no provision is made as to who shall designate the particular judge and request him to act, it is held that the power rests in the disqualified judge.[1]

The power to appoint in case of the temporary absence or inability of the regular judge confers no authority to make such appointment, even temporarily, where the office of judge is vacant.[2] Such appointments are usually authorized to be made upon conditions or contingencies specified in the statute or in the constitution. And in order to render the appointment valid, such conditions, or causes for the appointment, must exist.[3]

But the mere mode of selection or the person by whom the selection shall be made is sometimes held to be merely directory, and, the proper result having been reached, an immaterial variation will not vitiate the appointment.[4]

It is not necessary, in case of a collateral attack, that the existence of the causes shall appear on the face of the record.[5]

If the record is silent on the subject, and such an appointment could have been made, legally, under any circumstances, the authority for making the appointment, and that the grounds therefor existed, will be presumed.[6]

[1] Granite Mount. Min. Co. *v.* Durfee, 11 Mont. 222; 27 Pac. Rep. 919.

[2] Case *v.* State, 5 Ind. 1.

[3] *Ante*, sec. 57; Ellis *v.* Karl, 7 Neb. 381; Royal Ins. Co. *v.* Rufer, 89 Ky. 518; 12 S. W. Rep. 1043; Tyler *v.* Board of Supervisors, 15 N. Y. Sup'l, 366.

"Where the constitution prescribes a mode of selection of a substitute or special judge, and indicates the causes which will justify such selection, it excludes other modes of selection, and other causes." 12 Am. & Eng. Enc. of Law, 25, *citing* State *v.* Phillips, 27 La. An. 663; State *v.* Frank, 27 La. An. 689; State *v.* Judge, 9 La. An. 62; Hayes *v.* Hayes, 8 La. An. 468.

[4] Gallup *v.* Smith, 59 Conn. 354; 22 Atl. Rep. 334.

[5] *Ante*, sec. 51, p. 350; sec. 57, p. 371.

[6] *Ante*, secs. 51, p. 350; 27, p. 371; People *v.* Mellon, 40 Cal. 648, 655; Green *v.* Walker, 99 Mo. 68; 12 S. W. Rep. 353; Hunter *v.* Ferguson, 13 Kan. 462; Kenney *v.* Phillipy, 91 Ind. 511; State *v.* Sachs, 29 Pac. Rep. 446; Dissenting opinion of Lewis, J., Gresham *v.* Ewell, 84 Va. 784; 6 S. E. Rep. 700.

And where the record recites the fact that the regular judge was disqualified, and the appointment of the special judge, it will be presumed that the appointment was regular.[1]

It is held, however, under the statutes of some of the states, that the facts must appear on the record, or the proceedings of the special judge are void, because the statute expressly requires the causes to be entered of record.[2] And it is held that the cause of disqualification of the regular judge must appear in the record in case of a transfer to another judge, and that it is not sufficient that it appear generally that such judge was "disqualified to hear and determine the cause."[3]

If the right to appoint a special judge depends upon the disqualification of the regular judge, the latter can not recuse himself and appoint a special judge where a party to the action could not legally do so.[4]

Usually it is held that the party objecting to the substitution of a special for the regular judge, whether the party substituted is an attorney or another judge, must make his objection at the time, or at least before submitting to a trial before such special judge, or the right to contest the substitution will be waived, unless the want of authority of the special judge appears affirmatively in the record.[5] In other words, it can not be shown *dehors* the record, by a party to the judgment, that a special judge who has, without objection, proceeded to judgment in a cause, was not legally appointed.[6]

[1] Hess *v.* Dean, 66 Tex. 663; 2 S. W. Rep. 727.

But see, on this point, Smith *v.* State, 24 Tex. 290; 6 S. W. Rep. 40, where it was held that under the statute in Texas, the record upon appeal must show the reasons for the selection of a special judge and the manner in which he became such judge.

[2] Gresham *v.* Ewell, 84 Va. 784; 6 S. E. Rep. 700; Smith *v.* State, 24 Tex. 290; 6 S. W. Rep. 40.

[3] Roberts *v.* State, 27 Fla. 244; 9 Sou. Rep. 246.

[4] State *v.* Judge, 41 La. An. 319; 6 Sou. Rep. 22.

[5] Lillie *v.* Trentman, 130 Ind. 16; 29 N. E. Rep. 405; State *v.* Sachs, 29 Pac. Rep. 446; State *v.* Gilmore, 19 S. W. Rep. 218; Littleton *v.* Smith, 119 Ind. 230; 21 N. E. Rep. 886.

[6] Littleton *v.* Smith, 119 Ind. 230; 21 N. E. Rep. 886; Harman *v.* Moore, 112 Ind. 221; 13 N. E. Rep. 718; Adams *v.* Gowan, 89 Ind. 358.

And if the objection goes to the form of the appointment, as for example that it is not in writing, a new appointment may be made and the objection thus obviated.[1] And any irregularities in the appointment may be waived in the same way. So the acts of a special judge, as well as another, may be upheld as the acts of a *de facto* officer where the circumstances are such as to warrant it.[2]

The same presumptions of jurisdiction attach to the records of proceedings before special judges as before the regular judge.[3] And where the record shows a proper appointment and trial, it can not be disputed, collaterally, but is conclusive upon parties before the court.[4]

Where no attempt is made to comply with the statute authorizing an appointment, but an attorney, with consent of parties, is permitted to act as judge in the performance of any judicial act, the act is wholly without authority and void.[5]

Where the objection is seasonably made that the appointment is not made in writing, when it is required to be so made, or that it is not in compliance with the statute for any other reason, it will be held, on appeal, that an appointment not in writing or otherwise insufficient confers no authority.[6]

The acts of the special judge, so appointed, are not void, but voidable by entering an objection at the proper time.[7]

[1] Taylor *v.* Bosworth, 1 Ind. Appellate, 54; 27 N. E. Rep. 115.

[2] *Ante*, sec. 60; Hunter *v.* Ferguson, 13 Kan. 462; State *v.* Lewis, 107 N. Car. 967; 12 S. E. Rep. 457; Greenwood *v.* State, 116 Ind. 485; 19 N. E. Rep. 333; State *v.* Murdock, 86 Ind. 124.

[3] Green *v.* Walker, 99 Mo. 68; 12 S. W. Rep. 353; State *v.* Gamble, 18 S. W. Rep. 1111.

[4] Reid *v.* Mitchell, 93 Ind. 469. But see the dissenting opinion of Elliott, J., in the case just cited, p. 474.

[5] McClure *v.* State, 77 Ind. 287; Herbster *v.* State, 80 Ind. 484.

[6] Greenwood *v.* State, 116 Ind. 485; 19 N. E. Rep. 333; Kennedy *v.* State, 53 Ind. 542.

[7] "Objection was duly made to the judge of the court, and he called a member of the bar to preside as judge, but made no written appointment, as the law requires. The appellant at once objected to the competency of the attorney called by the judge, and thus presented the question at the earliest opportunity. As there was no written appoint-

And where the appointee is required by the statute to take the oath of office, and no such oath is taken, an objection to his acting, on that ground, will be sustained on appeal if made in the court below at the proper time, and in such case, the facts necessary to show his due appointment and qualification must appear in the record.[1]

Where authority is given the governor, for certain causes, to direct a judge to hold court in another district it can not be shown, in support of a writ of prohibition to prevent such judge from acting, where the same does not appear of record, that such causes did not exist.[2]

If the special judge fails to appear within the time for which he is appointed, or fails to complete the trial within the term for which he was authorized to act, the cause returns, without further action, to the regular judge, and a new appointment must be made.[3]

The extent of the powers of an attorney appointed as special judge is usually provided for and limited by the statute by which the appointment is authorized, or by the

ment, and as the objection was promptly interposed, the appeal must be sustained. Schlungger *v.* State, 113 Ind. 295; 15 N. E. Rep. 269; Herbster *v.* State, 80 Ind. 486; Evans *v.* State, 56 Ind. 459; Kennedy *v.* State, 53 Ind. 542.

In sustaining this appeal, we do not mean to hold that an oral appointment is absolutely void. On the contrary, we do hold, as we did in Schlungger *v.* State, *supra*, that it is not absolutely void, and that an objection to the method of appointment may be waived, and will be deemed waived, unless seasonably made. The person appointed is at least judge *de facto*, and, in order to make availing an objection to the competency of a *judge de facto*, it must be promptly interposed, for the acts of such a judge may be valid, and so they will be regarded where there has been a waiver of objections. Smurr *v.* State, 105 Ind. 125; 4 N. E. Rep. 445, and authorities cited. The term 'void' is improperly used in some of the cases, for the acts of a *de facto* judge are at most only voidable. We can not approve of some of the expressions found in the cases upon this question; for we are convinced that, upon principle and authority, the acts of a *de facto* judge will stand, unless promptly and properly assailed." Greenwood *v.* State, 116 Ind. 485; 19 N. E. Rep. 333.

[1] Kennedy *v.* State, 53 Ind. 542.

[2] Pico *v.* Williams, 11 Pac. Rep. 600.

[3] Singleton *v.* Pidgeon, 21 Ind. 118; Glenn *v.* State, 46 Ind. 368; Greenup *v.* Crooks, 50 Ind. 410.

constitution, and such statute or constitutional provision is the foundation of his right to act, and he can not legally go beyond the authority thereby conferred upon him. But by some of the statutes he is given the same authority, during the continuance of his appointment, as the judge elect.[1] And this general authority has been held to authorize such special judge to sign a bill of exceptions after the term of his appointment in a case tried before him during such term, in a state where it is held that the regular judge can not sign a bill of exceptions after his term of office has expired.[2]

Such power would appear much more clearly to exist in those states in which the judge elect is held to have authority to settle and sign a bill of exceptions after the expiration of his term of office, which is the case in some of the states.[3]

Where a judge is called from another district, he is usually given all of the powers of the resident judge, for the time being, but his authority, like that of an attorney appointed, may be and sometimes is limited by the constitution or statute.[4] And, if his powers are limited by the constitution, a statute attempting to confer greater or different powers upon him is invalid.[5] But, where the constitution authorizes a judge called from another district to perform certain duties, but does not forbid the performance of other duties by him, the legislature may, by statute, extend his authority to other acts.[6]

Where a special judge is appointed, or elected, to try a cause, and the same is afterward transferred to another

[1] Shugart *v.* Miles, 125 Ind. 445; 25 N. E. Rep. 551; Perkins *v.* Hayward, 124 Ind. 445; 24 N. E. Rep. 1033; State *v.* Neider, 94 Mo. 79; 6 S. W. Rep. 708; Powers *v.* State, 23 Tex. 42; 5 S. W. Rep. 153.

[2] Shugart *v* Miles, 125 Ind. 445; 25 N. E. Rep. 551; M. K. & T. Ry. Co. *v.* City of Fort Scott, 15 Kan. 435, 475.

[3] Fellows *v.* Tait, 14 Wis. 156; Davis *v.* President, etc., 20 Wis. 205; M. K. & T. Ry. Co. *v.* City of Fort Scott, 15 Kan. 435, 476.

[4] *Ante*, sec. 57; Morriss *v.* Virginia Ins. Co., 85 Va. 588; 8 S. E. Rep. 383.

[5] *Ante*, sec. 57.

[6] *Ante*, sec. 57, p. 371; Holden *v.* Haserodt, 51 N. W. Rep. 340.

county for trial, he may follow the case into the other county and try it there.[1]

A judge appointed *pro tempore*, by the regular judge, can not appoint another to act as judge in his stead.[2]

Court can not legally be held by a special judge where there is but one regular judge of the district and he is holding a regular term of court at the time. This has been held where the regular and special judges were holding courts in different counties in the district.[3]

A special judge elected to try a cause, and whose authority terminates with the termination of the action, has authority to re-try the same, if reversed on appeal and a new trial ordered.[4] And, where such special judge is selected because of the disqualification of the regular judge, his authority continues until the action is terminated, al-

[1] State *v.* Higgerson, 19 S. W. Rep. 624.

[2] Cargar *v.* Fee, 119 Ind. 536; 21 N. E. Rep. 1080.

[3] "The commencement of a term is a legislative command to the elected judge to be present and discharge the judicial duties devolving upon him in that county. It operates as a suspension of his duties in all other counties in his district, and suspends, or closes, the terms in those counties. The legislature provides for terms, in order to secure his personal attention to the litigation in each county. It prescribes the commencement of each term, leaving the time of closing to the discretion of the judge acting upon the necessities of business. It does not leave the commencement to his discretion, because it intends that each county shall have the benefit of his presence and labors at a certain and known time. The people of the entire district elect the judge. Each county is entitled to the benefit of his learning and experience. And the legislature by terms names the time of his attendance. Impliedly, thereby commanding him to attend in one county, it equally commands him to leave all the others. The case of Grable *v.* The State, 2 G. Greene, 559, is strongly in point. Under similar provisions, the supreme court of Iowa there held that the term in one county was closed on the day the term was by law to commence in another. It says: 'From the constitution of our judicial system, it is apparent that the court can not be held in two counties in the same district on the same day, and by one and the same judge.' So we say here, there is but one district court and one district judge in a district. The officer is not to be duplicated, and, when a term commences in one county, the court every-where else in the district is closed, or suspended. A judge *pro tem.* is only a substitute, and never a duplicate. In re Millington, 24 Kan. 214, 224.

[4] State *v.* Sneed, 91 Mo. 552; 4 S. W. Rep. 411.

though, in the meantime, a regular judge, not disqualified, takes the bench. The cause may, in such case, be heard by either the regular or special judge.[1] And his authority includes not only the trial of the particular action, but any litigation between the same parties growing out of that action; for example, an action to vacate the judgment therein and enjoin the levy of execution issued thereon.[2]

A special judge who refuses to act on the ground that the regular judge is not disqualified, when in fact he is disqualified, may be compelled by *mandamus* to proceed.[3]

62. JUDGES DISQUALIFIED BY INTEREST OR OTHERWISE.—A judge who is in all other respects competent may be wholly without authority to act in a particular cause or proceeding because of some disqualification affecting his right to preside in such cause or proceeding. This may arise from some personal interest he may have in the result of the action as a party, or as attorney or counsel for a party, or from other causes.[4] It is the policy of the law to withhold from a judge all power or jurisdiction to act in any matter in which he has a personal interest, irrespective of the wishes or consent of the parties interested.[5] But the kind or degree of interest that will disqualify can not be

[1] Noffzieger *v.* Reed, 98 Mo. 87; 11 S. W. Rep. 315.

[2] Harris *v.* Musgrave, 72 Tex. 18; 9 S. W. Rep. 90.

[3] Schultze *v.* McLeary, 73 Tex. 92; 11 S. W. Rep. 924.

[4] Freeman on Judg., sec. 144.

[5] Duncan *v.* McCall, 139 U. S. 449; 11 Sup. Ct. Rep. 573; Templeton *v.* Giddings, 12 S. W. Rep. 851; Oakley *v.* Aspinwall, 3 N. Y. 547; Heilbron *v.* Campbell, 23 Pac. Rep. 122; Cooley's Const. Lim., *pp. 410–413.

"The provision of article 29 of our declaration of rights, that 'it is the right of every citizen to be tried by judges as free, impartial, and independent as the lot of humanity will admit,' rests upon a principle so obviously just, and so necessary for the protection of the citizen against injustice, that no argument is necessary to sustain it, but it must be accepted as an elementary truth. The impartiality which it requires incapacitates one to act as a judge in a matter in which he has any pecuniary interest, or in which a near relative or connection is one of the parties. It applies to civil as well as criminal cases; and not only to judges of courts of law and equity and probate, but to special tribunals, and to persons authorized on a special occasion to decide between par-

accurately defined. It must, however, be some direct interest that is personal to the judge and not such a general or public interest as affects all persons in the district or community contingently only and equally with him.[1]

It is provided in the statutes of some of the states that the general interest one has as a tax-payer of a city or county will not disqualify a judge in an action by or against such city or county.[2] And this is the accepted doctrine of some of the cases independently of such statutory provisions.[3] It must be a property, or pecuniary interest.[4] So it is held that the bias or prejudice of the judge, or a desire on his part that one or the other of the parties shall succeed, is not sufficient to disqualify him.[5] And it must

ties in respect to their rights. It existed under the common law from the earliest times." Hall *v.* Thayer, 105 Mass. 219; 7 Am. Rep. 513.

[1] Sauls *v.* Freemen Co. Com'r, 24 Fla. 209; 4 Sou. Rep. 525; Commissioners, etc., *v.* Lytle, 3 Ohio, 290; Commonwealth *v.* Ryan, 5 Mass. 89; Inhabitants of Northampton *v.* Smith, 52 Mass. (11 Met.) 390; Peck *v.* Freeholders of Essex, 20 N. J. Law, 457.

[2] Smith *v.* Faxon, 31 N. E. Rep. 687.

[3] State *v.* Severance, 4 Atl. Rep. 560; State *v.* Craig, 80 Me. 85; 13 Atl. Rep. 129; Peck *v.* Freeholders of Essex, 20 N. J. Law, 457.

But see Peck *v.* Freeholders of Essex, 21 N. J. Law, 656, in which the same case just cited was reversed by the Court of Errors and Appeals and the doctrine declared that such an interest rendered the judge incompetent.

[4] Sauls *v.* Freeman, 24 Fla. 209; 4 Sou. Rep. 525; Ex parte Harris, 7 Sou. Rep. 1; Taylor *v.* Williams, 26 Tex. 583; Inhabitants of Northampton *v.* Smith, 52 Mass. (11 Met.) 390.

"The interest meant by the statute is property interest. In Inhabitants of Northampton *v.* Smith, 11 Metc. 395, it is said that the interest must be a pecuniary or proprietary interest,—a relation by which, as debtor or creditor, as heir or legatee, or otherwise, the judge will gain or lose something by the result of the proceedings,—in contradistinction to an interest of feeling or sympathy or bias that would disqualify a juror. See, also, Sjoberg *v.* Nordin, 26 Minn. 501, 5 N. W. Rep. 677. If the nature of the suit is such that no individual property interest of the judge or juror is involved in it, there can be no disqualification, as to either, on the ground of interest. Such is clearly the nature of a *mandamus* proceeding. It was not brought to enforce any individual property rights of any one, but to compel the commissioners to perform a public duty." Sauls *v.* Freeman, 24 Fla. 209; 4 Sou. Rep. 525, 528.

[5] Post, sec. 63; Sjorberg *v.* Nordin, 26 Minn. 501; 5 N. W. Rep. 677; Ex parte Harris, 7 Sou. Rep. 1; Taylor *v.* Williams, 26 Tex. 583.

be such an interest as will be affected, directly, by the determination of the action, and not incidentally or in an uncertain or remote degree.[1] But it must not be understood from this that some interest of the judge must be actually involved in the issues and will be directly affected by the result. If his rights regarding the subject-matter of the pending action will be affected, or he may be placed in a more or less favorable situation, in litigation that may follow respecting the same subject-matter, he is disqualified.[2]

[1] Webster *v.* Com'rs Wash. Co., 26 Minn. 220; 2 N. W. Rep. 697; North Bloomfield G. M. Co. *v.* Keyser, 58 Cal. 315; Inhabitants of Northampton *v.* Smith, 52 Mass. (11 Met.) 390.

[2] "So, putting the matter in the most favorable light for the respondent, we have a case in which three parties are adversely claiming to be the owners of a certain tract of land, one of whom is a judge of the court, and the other two adverse litigants before him, asking him, by his judgment, to determine which of them is the owner of the land which he claims to own. Not only so, but he is asked to appoint a receiver to take possession of land which he claims to own, and account to him for its management. He is called upon by the application for a receiver, or may be, to determine what lands shall go into the hands of such receiver. As he claims a part of the land, and asserts that it is not within the larger tract in dispute, the temptation to exclude it in making his order will at once arise; and, if his land is to go into the hands of a receiver, it must be of some interest to him who shall become such receiver, and take charge of and manage the land. It seems to us that neither argument nor authority is necessary to show that a judge should be prohibited from sitting in a cause under such circumstances; but we cite Code Civil Pro., sec. 170; Mining Co. *v.* Keyser, 58 Cal. 315; Stockwell *v.* Board, 22 Mich. 341; Hall *v.* Thayer, 105 Mass. 219; Cottle's Appeal, 5 Pick. 482; Sigourney *v.* Sibley, 21 Pick. 101; Coffin *v.* Cottle, 9 Pick. 287; Gay *v.* Minot, 3 Cush. 352; Moses *v.* Julian, 45 N. H. 52; Oakley *v.* Aspinwall, 3 N. Y. 547.

"It is contended that our statute only disqualifies a judge where he has a direct interest in the result of the suit, and that, as in this case a judgment for or against either of the parties, determining the controversy between them, could not bind the judge, or affect his title to the land claimed by him, he was not disqualified. But we can not give the statute this narrow construction. It should be the duty and desire of every judge to avoid the very appearance of bias, prejudice, or partiality; and to this end he should decline to sit, or, if he does not, should be prohibited from sitting, in any case in which his interest in the subject-matter of the action is such as would naturally influence him either one way or the other. We have shown how a judge might, and proba-

A mere interest in the question involved, there being no interest in the subject-matter of the action does not

bly would, be influenced to act in the appointment of a receiver. In the decision of the action on its merits, the temptation to decide in favor of one party or the other might be equally strong. It might become very important to him to have the land go to one of the claimants rather than the other. One might be friendly to him, and his claim, and the other not. With one a compromise might be easy, and with the other difficult. One might be much more inclined, and more able, pecuniarily or otherwise, than the other, to litigate his claim against him. And, aside from what might influence the judge under such circumstances, it appears to us to be unseemly for a judge to sit in an action involving the title, as between the litigants, to a subject-matter of which he claims to be the sole owner, and must in the end litigate as between himself and the litigant who succeeds to the property by his judgment." Heilbron *v.* Campbell, 23 Pac. Rep. 123; 24 Pac. Rep. 930.

"It is an ancient maxim, and one founded in the most obvious principles of natural right, that no man ought to be a judge in his own cause. That principle finds expression in our statute in these words: 'No justice, judge, or justice of the peace shall sit or act in any action or proceeding: 1. To which he is a party, or in which he is interested.' . . . (Sec. 170, Code Civ. Proc.) This provision should not receive a technical or strict construction, but rather one that is broad and liberal. 'The court ought not to be astute to discover,' said the Supreme Court of Michigan, in Stockwell *v.* The Township Board of White Lake, 22 Mich. 350, 'refined and subtle distinctions to save a case from the operation of the maxim, when the principle it embodies bespeaks the propriety of its application. The immediate rights of litigants are not the only objects of the rule. A sound public policy, which is interested in preserving every tribunal appointed by law from discredit, imperiously demands its observance.' Undoubtedly the prohibition does not extend to cases where the interest is simply in some question or questions of law involved in the controversy, or when it is indirect and remote; and if the interest of Judge Keyser in the suit pending before him extends no further than that, it is clear that he is not disqualified to determine the cause. But we can not so regard his interest upon the facts as presented. The city of Marysville says in its complaint, that the defendants are causing the property of the city and that of its inhabitants great and irreparable damage by sending down the Yuba River vast quantities of tailings from their mines, thus polluting the waters of the river, filling up its channel, overflowing the adjacent lands, and depositing the debris on the lands of the city, and otherwise injuring it and its people. The defendants say, in their petition, that the respondent owns land adjoining those of the city, and similarly situated; that in precisely the same manner and to the same extent that the tailings sent down the Yuba River by them injure the lands of the city of Marysville and its inhabitants, they injure the lands of the

disqualify the judge.[1] The possibility of the judge being affected may be so remote as not to disqualify.[2] But where he has a direct and certain interest in the result, no matter how small the interest may be, he is disqualified.[3] And where the interest consists of a claim against an estate, the fact that the judge has resolved not to prosecute his claim does not affect the question.[4]

Usually it is provided by statute, and where it is not so provided it is held by the courts, that the same interest that would disqualify a juror to sit in a cause will disqualify a judge to preside.[5] But this is true only as to his pecuniary interest in the result of the suit, consanguinity or affinity to a party to the suit and the like. A juror may be disqualified on account of his feeling of bias or preju-

respondent. The city of Marysville says the acts of the defendants in the particulars mentioned are unlawful, and it asks the judgment of the court enjoining them from sending, or permitting to be sent, down the Yuba River the tailings or debris from the mines or from otherwise polluting the waters of the river.

"If the relief prayed for is awarded, the same judgment that stops the flow of tailing or debris on to the lands of the city of Marysville, stops its flow onto the lands of the respondent. *The very judgment* that will protect Marysvile will protect him. His interest, therefore, is not merely in the questions of law involved in the controversy, nor is it uncertain or remote; but it is a direct and immediate interest in the result of the action. We are, therefore, of the opinion that respondent is disqualified to sit in judgment in the cause." North Bloomfield G. M. Co. *v.* Keyser, 58 Cal. 315, 322.

[1] McFadden *v.* Preston, 54 Tex. 443.

[2] Ex parte Alabama State Bar Association, 8 Sou. Rep. 768; Commonwealth *v.* Ryan, 5 Mass. 89.

[3] "It is very certain that, by the principles of natural justice, of the common law, and of our constitution, no man can lawfully sit as judge in a cause in which he may have a pecuniary interest. Nor does it make any difference, that the interest appears to be trifling; for the minds of men are so differently affected by the same degrees of interest that it has been found impossible to draw a satisfactory line. *Any* interest, therefore, *however* small, has been held sufficient to render a judge incompetent." *Pearce* v. *Atwood*, 13 Mass. 324, 340.

[4] Sigourney *v.* Sibley, 38 Mass. 101.

[5] Sjorberg *v.* Nordin, 26 Minn. 501; 5 N. W. Rep. 677; Sauls *v.* Freeman, 24 Fla. 209; 4 Sou. Rep. 525; Horton *v.* Howard, 79 Mich. 642; 44 N. W. Rep. 1112.

dice or of hostility toward one of the parties that would not disqualify a judge.[1]

The circumstances that have been held to disqualify a judge are of various kinds: 1. Personal pecuniary interest in the result of the action.[2] It is not necessary that the judge be a party to the action or that his interests would be determined by the judgment rendered. If the adjudication might be such as to affect his rights or interests in another action if brought, it is enough.[3] So if the judgment, although not for or against him would, if enforced, necessarily protect his property.[4] 2. Having been of counsel for one interested in the result.[5] It has been held that the fact of the judge having been attorney for one of the parties in another action involving one of the issues presented in the action before him does not disqualify him.[6] But this is a very narrow construction of the rule and statutes and is open to very serious question. It is a decision that it will be better to overlook.[7] 3. Consanguinity or affinity to a party or one having an interest.[8] Consanguinity or affinity was not a disqualification at common law.[9]

Relationship to a stockholder of a corporation does not disqualify in an action in which the corporation is a

[1] Post, sec. 63; Fleming *v.* State, 11 Ind. 234; Sauls *v.* Freeman Co. Com'rs, 24 Fla. 209; 4 Sou. Rep. 525; Sjorberg *v.* Nordin, 26 Minn. 501; 5 N. W. Rep. 677; Ex parte Harris, 7 Sou. Rep. 1.

[2] Moses *v.* Julian, 45 N. H. 52; 84 Am. Dec. 114; Estate of White, 37 Cal. 190.

[3] Templeton *v.* Giddings. 12 S. W. Rep. 851; Succession of Jan., 10 Sou. Rep. 6.

[4] North Bloomfield G. M. Co. *v.* Keyser, 58 Cal. 315.

[5] Moses *v.* Julian, 45 N. H. 52; 84 Am. Dec. 114; Johnson *v.* State, 29 Tex. 526; 16 S. W. Rep. 418; Estate of White, 37 Cal. 190.

[6] Amann *v.* Lowell, 66 Cal. 306.

[7] For a similar construction of a constitutional provision see Taylor *v.* Williams, 26 Tex. 583.

[8] Horton *v.* Howard, 79 Mich. 642; 44 N. W. Rep. 1112; Moses *v.* Julian, 45 N. H. 52; 84 Am. Dec. 114; Oakley *v.* Aspinwall, 3 N. Y. 547; Matter of Dodge, etc., Mf'g Co., 77 N. Y. 101; People *v.* De LaGuerra, 24 Cal. 73.

[9] Matter of Dodge, etc. Mf'g Co., 77 N. Y. 101.

"Affinity is the tie arising from marriage, between the husband and

party.[1] But the cases so holding are usually based upon statutes providing that relationship to a *party* shall disqualify a judge, it being held that a stockholder not being a party the case is not within the terms of the statute. If the judge is himself a stockholder he is disqualified.[2]

4. Bias and prejudice for or against one of the parties.[3]- This, however, is not a disqualification in some of the states, and usually it is made ground for a change of venue, and is waived if the objection is not made in advance.[4] But under such statutes the judge becomes disqualified, upon the proper application for a change of venue being made, as completely as in other cases of disqualification.[5] And some of the statutes provide, in terms, that the judge shall be incompetent to sit in the cause when the affidavit provided for is made.[6] It is held in some of the cases that the judge can not be allowed to question whether the recusation is well founded or not, and that this must be left to the decision of the special judge who may be called to determine.[7] But this is not so in all of the states as has been shown elsewhere.[8] What effect the disqualification of a judge will have upon a judgment rendered is not uniformly determined. But certainly where a judge is forbidden by positive law to act under certain disqualifying

the blood relations of the wife, and between the wife and the blood relations of the husband, but there is no affinity between the kinsman of the wife and those of the husband, or *vice versa*. Thus, say the books, the husband's brother and the wife's sister have no affinity. The same must be true of the husband's brother and the wife's brother. See title 'Affinity,' in the law dictionaries of Tomlin, Bonvier, Abbott and Rapalje & Lawrence. There is no affinity between the blood relatives of the husband and blood relatives of the wife. Paddock *v.* Wells, 2 Barb. Ch. 331; Carman *v.* Newell, 1 Denio, 25; Spear *v.* Robinson, 29 Me. 531; Waterhouse *v.* Martin, Peck (Tenn.) 373." Ex parte Harris, 7 Sou. Rep. 1.

[1] Matter of Dodge, etc., Mf'g Co., 77 N. Y. 101, 109; Searsburgh Tp. Co. *v.* Cutler, 6 Vt. 315.

[2] Cook Stock & Stockholders, sec. 4*a*. [3] Post, sec. 63.

[4] Ante, secs. 46, 49; post sec. 63; Ex parte Harris, 7 Sou. Rep. 1.

[5] Ante, secs. 24, p. 15, 46, p. 337, 47, 51; post, sec. 63; State *v.* Judge, 39 La. An. 994; 3 Sou. Rep. 91.

[6] In re Bedard, 17 S. W. Rep. 693.

[7] State *v.* Judge, 39 La. An. 994; 3 Sou. Rep. 91. [8] Ante, secs. 47, 51.

circumstances, his acts done in violation of such prohibition should be treated as absolutely void.[1]

And such should be the effect where the act is not expressly forbidden, but is made a ground for a change of judge. But, whether this is so or not, is not so well settled.

If the question of interest were one affecting the parties alone, they might properly be held to waive it by consent or a failure to raise an objection. But it is a matter in which the whole public is interested. The rule that forbids one to sit as judge in his own case is one of public policy affecting the due and proper administration of justice, and should render void the proceedings of a judge affecting matters of private concern to himself whether objection is made by the parties directly interested or not.[2]

[1] Horton *v.* Howard, 79 Mich. 642; 44 N. W. Rep. 1112; Moses *v.* Julian, 45 N. H. 52; 84 Am. Dec. 114; Templeton *v.* Giddings, 12 S. W. Rep. 851; Oakley *v.* Aspinwall, 3 N. Y. 547

In Horton *v.* Howard, *supra*, it is said:

"The next question is whether the decree is void, or merely voidable. No judge can sit in his own cause. Should he do so, a decree rendered by him in his own favor would be utterly void. If he can not sit, his seat, in a judicial sense, is vacant, and his acts are without judicial sanction. The inhibition of the statute is the same where he is related to a party to a cause, and the result is the same. The authorities are numerous, and nearly uniform, which hold that a judgment or decree rendered by a judge contrary to a statute like ours is void, and may be attacked collaterally. Foot *v.* Morgan, 1 Hill, 654; Oakley *v.* Aspinwall, 3 N. Y. 547; Estate of White, 37 Cal. 192; Chambers *v.* Hodges, 23 Tex. 104; Fecheimer *v.* Washington, 77 Ind. 366: Hall *v.* Thayer, 105 Mass. 219; In re Ryers, 72 N. Y. 1; In re Manufacturing Co., 77 N. Y. 101; Railway Co. *v.* Howard, 20 Mich. 25; Stockwell *v.* Board, 22 Mich. 349; Shannon *v.* Smith, 31 Mich. 452; West *v.* Wheeler, 49 Mich. 505; 13 N. W. Rep. 836."

[2] Cooley Const. Lim., *pp. 410–413.

"It is however urged at the bar, that although the judge were wanting in authority to sit and take part in the decision of this cause, yet that having done so at the solicitation of the respondent's counsel, such consent warranted the judge in acting, and is an answer to this motion.

"But where no jurisdiction exists by law it can not be conferred by consent, especially against the prohibitions of a law, which was not designed merely for the protection of the party to a suit, but for the general interests of justice. (Low *v.* Rice, 8 John. 409; Clayton *v.* Per Dun,

But it is said that the rule at common law was otherwise.[1] So it is held, in some of the cases, that the acts of a disqualified judge are not void where he is not forbidden to act by positive law, and no objection to his acting was made in advance.[2] But in other cases statutes forbidding

13 Id. 218; Edwards *v.* Russell, 21 Wend. 63; 21 Pick. 101.) It is the design of the law to maintain the purity and impartiality of the courts, and to insure for their decisions the respect and confidence of the community. Their judgments become precedents which control the determination of subsequent cases; and it is important, in that respect, that their decisions should be free from all bias. After securing wisdom and impartiality in their judgments, it is of great importance that the courts should be free from reproach or the suspicion of unfairness. The party may be interested only that his particular suit should be justly determined; but the state, the community is concerned not only for that, but that the judiciary shall enjoy an elevated rank in the estimation of mankind.

"The party who desired it might be permitted to take the hazard of a biased decision, if he alone were to suffer for his folly, but the state can not endure the scandal and reproach which would be visited upon its judiciary in consequence. Although the party consent, he will invariably murmur if he do not gain his cause; and the very man who induced the judge to act, when he should have forborne, will be the first to arraign his decision as biased and unjust. If we needed an illustration of this, the attitude which the counsel for the moving party in this case assumed toward the court, the strain of argument which he addressed to it, and the impression which it was calculated to make upon an audience, are enough to show, that whatever a party may consent to do, the state can not afford to yield up its judiciary to such attack and criticism as will inevitably follow upon their decisions made in disregard of the prohibitions of the law under consideration." Oakley *v.* Aspinwall, 3 N. Y. 547, 552.

[1] Freeman on Judg., sec. 145; But see Oakley *v.* Aspinwall, 3 N. Y. 547; Matter of Ryers, 72 N. Y. 1; Frevert *v.* Swift, 19 Nev. 400; 11 Pac. Rep. 273; 12 Am. & Eng. Enc. of Law, 41.

[2] Moses *v.* Julian, 45 N. H. 52; 84 Am. Dec. 114.

"At common law, the recusation of a judge does not affect his jurisdiction, and though the fact of his interest in the subject-matter in controversy will be ground for the reversal of his judgment, his action in the cause is regarded merely as an error or irregularity, and the judgment is therefore not void, but voidable only, except in the case of those inferior tribunals from which no appeal or writ of error lies. Freeman on Judgments, sec. 145; Dimes *v.* Grand Junction Canal Co., 17 Jur. 73; S. C., 16 Eng. L. & Eq. 63; Hesketh *v.* Braddock, 3 Burr. 1847; Heydenfeldt *v.* Towns, 27 Ala. 423; Trawick *v.* Trawick, 67 Id. 271; McMillan *v.* Nichols, 62 Ga. 36, 38; Rhea's Succession, 31 La. An. 323; Gorrill *v.*

an interested judge to act are held to be declaratory of the common law, and of a universal principle which forbids a judge to sit in his own cause.[1] And it is very questionable whether a statute authorizing the trial of a cause

Whittier, 3 N. H. 268; Stearns *v.* Wright, 51 Id. 609, 610; the principal case; Ten Eick *v.* Simpson, 11 Paige, 179; Gregory *v.* Cleveland R. R. Co., 4 Ohio St. 675; Chambers *v.* Hodges, 23 Tex. 104. But see Foreman *v.* Hunter, 59 Iowa, 550, containing a mere *dictum, contra.* And it is only under express statutory inhibition that the judgment is void. Claunch *v.* Castleberry, 23 Ala. 85; Heydenfeldt *v.* Towns, 27 Id. 423; Fecheimer *v.* Washington, 77 Ind. 366; Ten Eick *v.* Simpson, 11 Paige, 179; Chambers *v.* Hodges, 23 Tex. 104. In most of the states, however, statutes have been passed which expressly prohibit a judge from trying, sitting in, or acting in certain specified cases. And this prohibition in express terms goes to the jurisdiction; the judgment is *coram non judice*, and, therefore, void wherever brought in question. Freeman on Judgments, sec. 146; Claunch *v.* Castleberry, 23 Ala. 85; Heydenfeldt *v.* Towns, 27 Id. 423; People *v.* De la Guerra, 24 Cal. 73; Estate of White, 37 Id. 190; Fecheimer *v.* Washington, 77 Ind. 366; Buckingham *v.* Davis, 9 Md. 324; Cottle, Appellant, 5 Pick. 483; Coffin *v.* Cottle, 9 Id. 287; Sigourney *v.* Sibley, 21 Id. 101; S. C., 32 Am. Dec. 248, and note 252; Gay *v.* Minot, 3 Cush. 352; Bacon, Appellant, 7 Gray, 791; Hall *v.* Thayer, 105 Mass. 219; Stearns *v.* Wright, 51 N. H. 608; Bedell *v.* Bailey, 58 Id. 62; Wigand *v.* Dejonge, 8 Abb. N. C. 260; Schoonmaker *v.* Clearwater, 41 Barb. 200; Foot *v.* Morgan, 1 Hill, 654; People *v.* Tweed, 50 How. Pr. 434; Darling *v.* Pierce, 15 Hun, 542; Matter of Hancock, 27 Id. 78; Edwards *v.* Russell, 21 Wend. 63; Oakley *v.* Aspinwall, 3 N. Y. 547; Price *v.* Bowers, 8 Baxt. 353; Reams *v.* Kearns, 5 Cold. 217; Garrett *v.* Gaines, 6 Tex. 435; Chambers *v.* Hodges, 23 Id. 104; Newcome *v.* Light, 58 Id. 141; S. C., 44 Am. Rep. 604. 'It is no answer to the disqualification arising from interest in the proceedings to say that the decision in the cause was correct. The statute does not say that the judge is disqualified to decide erroneously, but that he shall not decide at all, except to arrange the calendar and the order of business, or to change the venue.' Per Rhodes, J., Estate of White, 37 Cal. 192; People *v.* De la Guerra, 24 Id. 77. And the mere affirmance on appeal of a judgment void for this reason under the statute, imparts no validity to it. Chambers *v.* Hodges, 23 Tex. 104; Matter of Hancock, 27 Hun, 78." Moses *v.* Julian, 84 Am. Dec. 127, note.

[1] Oakley *v.* Aspinwall, 3 N. Y. 547; Matter of Ryers, 72 N. Y. 1.

"The provisions of our revised statutes on this subject profess to be merely declaratory of universal principles of law which make no distinction between the case of interest and that of relationship, both operating equally to disqualify a judge. Hence, the statute declares that 'no judge of any court can sit as such in any cause to which he is a party or in which he is interested, or in which he would be disquali-

by a judge having a personal interest in the result is not void as depriving one of his property without due process of law.[1] It is said that this may be done where the dis-

fied from being a juror by reason of consanguinity or affinity to either of the parties.' (2 R. S. 275, sec. 2; Revisers' Notes, 3 R. S. 694.)

"After so plain a prohibition, can any thing more be necessary to prevent a judge from retaining his seat in the cases specified? He is first excluded by the moral sense of all mankind; the common law next denies him the right to sit, and then the revisers of our law declared that they intended to embody this universal sentiment in the form of a statutory prohibition, and so they placed this explicit provision before the legislature, who adopted it without alteration and enacted it as the law. The exclusion wrought by it is complete as is in the nature of the case possible. The judge is removed from the cause and from the bench; or if he will occupy the latter, it must be only as an idle spectator, and not as a judge. He can not sit as such. The spirit and language of the law are against it. Having disqualified him from sitting as a judge, the statute further declares that he can neither decide nor take part in the decision of the cause, as to which he is divested of the judicial function. Nor ought he to wait to be put in mind of his disability, but should himself suggest it and withdraw, as the judge with great propriety attempted to do in the present case. He can not sit, says the statute. It is a legal impossibility, and so the courts have held it. (Edwards *v.* Russell, 21 Wend. 63; Foot *v.* Morgan, 1 Hill, 654.)" Oakley *v.* Aspinwall, 3 N. Y. 547, 551; Matter of Ryers, 72 N. Y. 1; Hall *v.* Thayer, 105 Mass. 219; 7 Am. Rep. 513.

[1] Cooley's Const. Lim., *pp. 410–413; Hall *v.* Thayer, 105 Mass. 219; 7 Am. Dec. 513; Chambers *v.* Hodges, 23 Tex. 104, 112.

"It is a matter of some interest to know whether the legislatures of the American states can set aside this maxim of the common law, and by express enactment permit one to act judicially when interested in the controversy. The maxim itself, it is said, in some cases, does not apply where, from necessity, the judge must proceed in the case, there being no other tribunal authorized to act, but we prefer the opinion of Chancellor Sandford, of New York, that in such a case it belongs to the power which created such a court to provide another in which this judge may be a party; and whether another tribunal is established or not, he at least is not entrusted with authority to determine his own rights, or his own wrongs. . . .

"The people of the state, when framing their constitution, may possibly establish so great an anomaly, if they see fit; but if the legislature is intrusted with apportioning and providing for the exercise of the judicial power, we can not understand it to be authorized, in the execution of this trust, to do that which has never been recognized as being within the province of the judicial authority. To empower one party to a controversy to decide it for himself is not within the legislative authority, because it is not the establishment of any rule of action

qualification is by reason of an interest that is common to all tax-payers, but that the legislature has no such power where the interest is peculiar and direct.[1]

If the judge is disqualified by an express prohibitory statute or constitutional provision, his acts are void in the extreme sense and consent of parties can not vest him with jurisdiction. There can be no waiver of the disqualification under such circumstances.[2]

or decision, but is a placing of the other party, so far as that controversy is concerned, out of the protection of the law, and submitting him to the control of one whose interest it will be to decide arbitrarily and unjustly." Cooley Const. Lim. pp. 411, 412.

[1] State *v.* Crane, 36 N. J. Law, 394.

"The maxim under consideration has always been regarded in English jurisprudence, as elementary and fundamental in judicial action (Coke Lit., sec. 212, Broom, 109), and, I think, can no more be materially invaded by the legislature, than it could pass an act that a judge might decide according to lot, or for a party who should give him the most money. The chief justice, in Schroeder *v.* Ehlers, says, 'that a person can not be a judge in his own case, has ever been regarded as one of the fundamental maxims of the law of nature;' also, that the injustice of allowing it, is intuitive in the human mind. In my judgment, the legislature is impotent to break down this great barrier to tyranny and fraud. The power of the legislature has been seriously questioned even in removing disabilities for a common interest, and the fair implication of the cases is, considering the ground upon which it is sustained, the remoteness and smallness of the interest, that it does not reach beyond interests of a general nature. (See cases referred to.) The maxim is inherent in, and a part of the nature of judicial action, and although in many matters the legislature may provide for the exercise of judicial functions, and designate the person who shall exercise them, yet it can not, in so doing, lose sight of the essential character of judicial action, and authorize or sanction a judgment through instrumentalities contrary to the innate and universally recognized sense of natural justice. In such a case, the power conferred would not be judicial, it would be tyrannical." State *v.* Commissioners, 36 N. J. Law, 394, 403.

[2] Moses *v.* Julian, 45 N. H. 52; 84 Am. Dec. 114, 130 note; Freeman on Judg., sec. 146; Oakley *v.* Aspinwall, 3 N. Y. 547; State *v.* Sachs, 29 Pac. Rep. 446; Frevert *v.* Swift, 19 Nev. 363; 11 Pac. Rep. 273; Chambers *v.* Hodges, 23 Tex. 104, 112; Hall *v.* Thayer, 105 Mass. 219; 7 Am. Rep. 513.

"Where the statute expressly declares that the disqualified judge shall not act in the cause, this divests the judge of jurisdiction in the extreme sense, and his judgment is entirely incapable of being made good by any omission, waiver, or even express consent of both parties:

With respect to the policy of allowing a disqualified judge to sit in judgment in a case in which he is interested, the question whether he is expressly forbidden to act or not, should have no weight. And the language of the courts, so warmly condemning proceedings taken by a judge against these statutory provisions, is just as applicable to proceedings had in the absence of such provisions. It is the interest that the judge has in the result of the suit, that disqualifies, and not the statute. And the action of a judge, in trying his own case, is as much against

Oakley *v.* Aspinwall, 3 N. Y. 547; Converse *v.* McArthur, 17 Barb. 410; Chambers *v.* Clearwater, 1 Keyes, 314; Matter of Hancock, 27 Hun, 82; Clayton *v.* Per Dun, 13 Johns. 218; Low *v.* Rice, 8 Id. 409; Schoonmaker *v.* Clearwater, 41 Barb. 200; Richardson *v.* Welcome, 6 Cush. 331; Sigourney *v.* Sibley, 21 Pick. 101; S. C., 32 Am. Dec. 248; Peninsular R. R. Co. *v.* Howard, 20 Mich. 25; People *v.* De la Guerra, 24 Cal. 73. In regard to the giving of jurisdiction by consent, it is said in Oakley *v.* Aspinwall, 3 N. Y. 547, 552, 553, per Hurlbut, J.: 'The party who desired it might be permitted to take the hazard of a biased decision, if he alone were to suffer for his folly; but the state can not endure the scandal and reproach which would be visited upon its judiciary in consequence. Although the party consent, he will invariably murmur if he do not gain his cause; and the very man who induced the judge to act when he should have forborne, will be the first to arraign his decision as biased and unjust. If we needed an illustration of this, the attitude which counsel for the moving party in this case assumed toward the court, the strain of argument he addressed to it, and the impression it was calculated to make upon an audience, are enough to show that whatever a party may consent to do, the state can not afford to yield up its judiciary to such attack and criticism as will inevitably follow upon their decisions made in disregard of the prohibitions of the statute under consideration.' 'This language shows in a clear and forcible manner the evils resulting from the practice of permitting any judge to act, under any circumstances, in a matter wherein his judgment is likely to be attributed to improper motives;' Freeman on Judgments, sec. 146. 'The consent of parties could not remove his incapacity, or restore his competency against the prohibitions of law, which was designed, not merely for the protection of the party to the suit, but for the general interests of justice;' Chambers *v.* Hodges, 23 Tex. 113, per Wheeler, C. J. 'No restriction on this salutary rule should ever be made. Human nature is frail. 'Lead us not into temptation,' is a canon of petition worthy of divine origin, and the purity of the judicial ermine will be preserved best by removing its wearers far from all temptation; Matter of Hancock, 27 Hun, 80, per Dykman, J." Moses *v.* Julian, 84 Am. Dec. 130, note.

public policy and just as reprehensible whether there is such a statute or not. For these reasons the distinction made in the cases cited in the note do not seem to rest upon any reasonable or just foundation.

In some of the states parties are expressly authorized by statute to waive, by mutual consent, the objection that the judge is disqualified on certain grounds.[1] Under such a statute mere delay in objecting to a trial before a judge so disqualified will not waive the right to make such objection before trial.[2] But in some cases it is held that the objection must be made before issue joined.[3] Where the court is composed of several judges a majority of whom are disqualified to sit in a cause, the parties may stipulate that the cause may be submitted to and decided by the judges not disqualified, and the members of the court not competent to act may sit for the purpose of making a necessary quorum of the court.[4] But if one who is disqualified participates in the decision, the judgment can not be upheld, although a sufficient number of competent judges concur in the decision.[5] It is the duty of a judge, who is satisfied that he is legally disqualified, to decline to act without waiting for an objection from either of the parties.[6] But he can not recuse himself where he is not legally disqualified, and thus deprive the parties of a trial before him.[7]

Where provision is made for the transfer of a cause to another court where the judge is disqualified, such disqualification does not operate *per se* to transfer the same. The judge has the power to pass upon the question of his disqualification, and upon ascertaining the fact must make the necessary order for such transfer.[8] But he can make

[1] Stone *v.* Marion Co., 78 Ia. 14; 42 N. W. Rep. 570; Chase *v.* Weston, 75 Ia. 159; 39 N. W. Rep. 246; 12 Am. & Eng. Enc. of Law, 50.

[2] Chase *v.* Weston, 75 Ia. 159; 39 N. W. Rep. 246.

[3] 12 Am. & Eng. Enc. of Law, 51. [4] Walker *v.* Rogan, 1 Wis. 597.

[5] Moses *v.* Julian, 84 Am. Dec. 132, note.

[6] Moses *v.* Julian, 45 N. H. 52; 84 Am. Dec. 114.

[7] Ante, sec. 61; State *v.* Judge, 41 La. Ann. 319; 6 Sou. Rep. 22; Ex parte Harris, 7 Sou. Rep. 1.

[8] Poole *v.* Mueller Bros. Furniture Co., 80 Tex. 189; 15 S. W. Rep. 1055.

no order affecting or controlling the proceedings in the cause.[1] He is not, by his disqualification, prevented from executing a specific mandate of the supreme court to the court of which he is judge, and about which he has no discretion or power to decide.[2] Nor does it affect his power to perform purely ministerial acts.[3] The fact that a relative of the judge is attorney for one of the parties to the action does not, ordinarily, disqualify him.[4] But it is otherwise where such relative is to have, as compensation for his services, a part of the property in litigation in case he is successful.[5] The fact that the decision of a disqualified judge is correct does not affect the question of its invalidity.[6]

If a judge is vested by the constitution with exclusive jurisdiction, and his failure to act will deprive the parties of all remedy, he is held to be authorized to take such steps as may be absolutely necessary to avoid a failure of remedy.[7] Whether such would be the case where exclusive jurisdiction is conferred by statute, and not by the constitution, may well be doubted. In some of the cases a distinction is made between a substantial and direct pecuniary interest in the judge and those in which he "has not so direct an interest as that the result must necessarily affect him to his personal or pecuniary loss or gain, or where his personal or pecuniary interest is minute."[8]

The rule of disqualification does not apply to officers not judicial, although their acts may call for the exercise

[1] Salm *v.* State, 89 Ala. 56; 8 Sou. Rep. 66.

[2] State *v.* Collins, 5 Wis. 339.

[3] State *v.* Gurney, 17 Neb. 523; 23 N. W. Rep. 524.

[4] Patric *v.* Crowe, 25 Pac. Rep. 985.

[5] Howell *v.* Budd, 91 Cal. 342; 27 Pac. Rep. 747.

[6] Estate of White, 37 Cal. 190.

[7] Matter of Ryers, 72 N. Y. 1; Commonwealth *v.* Ryan, 5 Mass. 89; Pearce *v.* Atwood, 13 Mass. 324, 340.

[8] "It is, however, objected that, though this may be so, where exclusive jurisdiction is conferred by the constitution, it is not so where the power is given by statute, general or specific. True, it is said in books of high repute, that 'a legislative act, which should undertake to make a judge the arbiter in his own cause, would be void' (Cooley on Const. Lim., *175); and so has Lord Coke said (Co. Lit., sec. 212); and

of judgment and discretion.[1] If a judge persists in acting where he is disqualified he may be prevented from acting

so is the utterance in Day *v.* Savadge (Hobart, 212–218), (85–*87*b*). How this may be in an action at law or suit in equity, in which the judge was a party named or a party in fact, and where his interest was so close and immediate that there would be a direct pecuniary gain or loss, or direct personal triumph or defeat, to him by the result, we are not now called upon to say. For one I should loathe to hold, that by force of a legislative act, one could bring an action in which his interests were involved, in a court of which he was the sole judge, and could sit alone to hear and decide it. But we know that in cases in which the interest is not direct, but remote; is not certain and palpable, but contingent and problematical; is not great and important, but minute; statutes, not specific, but general, which have had the effect to confer exclusive jurisdiction, where there was an interest in the result, have been upheld as valid. In Strange, 1173 (*supra*), we are referred to the act of 16 Geo. II., c. 18, which was passed to remedy the difficulty arising from the decision there reported, which act gave power to all and every justice or justices of the peace to act in matters concerning parochial rates, notwithstanding they or he were chargeable therewith. (7 Evans Coll. Stats., p. 476.) I do not find any adjudication upon this act upholding or denying the validity of it. From the fact that it was passed as early as 1744, and the case above cited from Strange, with the reference therein to the act, appears in the third edition of those reports, published in 1792, without note of any judicial disapprobation; and from the further fact that another act of Parliament of like effect was passed (the 30 and 31 of Vict. (c. 115, sec. 2); see Fisher's Digest, vol. iii., p. 5107; I infer that the character, object, and effect of the enactment did not meet with judicial reprobation. But we are not left to inferences. There have been adjudications upon statutes conferring exclusive jurisdiction in general terms, wherein it has been held that the force of the enactment overrode the rule which disqualified by reason of interest. In Massachusetts it has been held that the interest which a justice of the peace has in a penalty payable to his town, though minute, takes away his jurisdiction of the offense. (Pearce *v.* Atwood, *supra.*) Yet the Supreme Court of that state has repeatedly held, that where there is but one tribunal authorized by statute to take cognizance of the offense, such interest does not disqualify. (Comm. *v.* Ryan, *supra;* Hill *v.* Wells, 6 Pick. 104; see remarks of Shaw, Ch. J., in Comm. *v.* Emery, 11 Cush., 406; Comm. *v.* Burding, 12 id. 506; Hanscomb *v.* Russell, 11 Gray, 373.) In this state we have statutes relieving jurors, witnesses, and certain officers from the disqualification of being interested in the penalties going into the county treasury or for the benefit of a town. (2 R. S., p. 420, sec. 58; p. 551, sec. 2; 1 id. 357, sec. 4; see Wood *v.* Rice, 6 Hill, 59.) These enactments were not new in principle, but copied from prior stat-

[1] People *v.* Wheeler, 21 N. Y. 82, 86.

by writ of prohibition.[1] And where he refuses to act on the ground that he is disqualified, when he is not so in fact, he may be compelled to act by *mandamus*.[2] So he may be compelled by *mandamus* to withdraw from the bench and call a special judge where he is disqualified or the necessary affidavit or recusation has been filed.[3]

In some of the states provision is made disqualifying judges who have acted in a lower court to sit in the same cause on appeal.[4] But in the absence of such a statute he

utes, and which had been passed probably to meet cases in which it had been adjudged that there was a disqualifying interest. (See Wood *v.* Stoddard, 2 J. R. 195.) The interest of an assessor of taxes in a town is very like that which is attributed to Judge Metcalfe in the case in hand, save that the official action which may be influenced by it is more direct. An assessor has a voice himself in fixing the valuation of his own land, and that of all other owners in the town. It is a judicial act. (Swift *v.* City of Poughkeepsie, 37 N. Y. 511.) Each assessor must be present at the meeting of the board, if he does his duty, and the assessment is the joint act of all, or at least a majority of the board. (People ex rel. *v.* Sups. of Chenango Co., 11 N. Y. 563.) So members of boards of supervisors and town auditors pass upon their own accounts. No fault has ever been found with this, for the necessity of the case demanded that it be so. So, merely formal acts, necessary to enable the case to have progress, an interested judge may do. Thus, where a circuit judge has been counsel in a cause (which relation is akin to that of having a personal interest in it, and is often made by statute a disqualification), he may execute an order of a higher court directed to the circuit judge (State *v.* Collins, 5 Wis. 339); and judges of the United States Circuit Court, where both are interested or have been of counsel, may make an order certifying the case to another circuit. (Richardson *v.* City of Boston, 1 Curtis, 250.)

"I think, then, that upon the facts of this case, as already stated, we may formulate a rule thus: That where a judicial officer has not so direct an interest in the cause or matter as that the result must necessarily affect him to his personal or pecuniary loss or gain, or where his personal or pecuniary interest is minute, and he has so exclusive jurisdiction of the cause or matter by constitution or by statute, as that his refusal to act will prevent any proceeding in it, then he may act so far as that there may not be a failure of remedy, or, as it is sometimes expressed, a failure of justice." Matter of Ryers, 72 N. Y. 1, 13.

[1] Heilbron *v.* Campbell, 23 Pac. Rep. 122.

[2] Ex parte State Bar Association, 8 Sou. Rep. 768.

[3] State *v.* Judge, 39 La. Ann. 994; 3 Sou. Rep. 91.

[4] Phillips *v.* Germania Mills, 13 N. E. Rep. 923.

is not disqualified.[1] A judge may be disqualified to hold the office of judge, and therefore incompetent to perform any of its duties, by reason of want of proper age, citizenship, or the like.[2] But such grounds of disqualification can not be taken advantage of in any pending action as between the parties. The question must be tested by a direct proceeding against the judge.

63. Bias and prejudice of judges as affecting jurisdiction.—Bias or prejudice of the judge is, in many of the states, made a ground for changing the venue of a cause.[3] This is upon the theory that every litigant is entitled to a fair and impartial trial, and that such a hearing can not be had before one whose mind is not free from such feeling as would naturally incline the mind of the court toward one of the parties or against the other. But usually it is held that such a state of mind on the part of a judge does not absolutely disqualify him or render any judgment rendered by him void.[4] However, if a change of venue is allowed on this ground, the filing of the necessary affidavit or recusation divests the court of all jurisdiction, under the decisions of most of the states, and any acts of his thereafter are wholly void.[5]

In some of the states the bias or prejudice of the judge is not made a cause of disqualification, or a ground for change of venue, and in such states such a frame of mind, however embarrassing to the parties, or the judge, does not affect his right or duty to sit in the case.[6]

[1] Pierce *v.* Delamater, 1 N. Y. 17.

[2] People *v.* Wilson, 15 Ill. 388. [3] Ante, secs. 46, 62.

[4] Ante, sec. 62; Sjorberg *v.* Nordin, 26 Minn. 501; 5 N. W. Rep. 677; Taylor *v.* Williams, 26 Tex. 583; Heflin *v.* State, 88 Ga. 151; 14 S. E. Rep. 112; Ex parte Harris, 26 Fla. 77; 7 Sou. Rep. 1; 12 Am. & Eng. Enc. of Law, 52; Foreman *v.* Hunter, 59 Ia. 550; 13 N. W. Rep. 659.

[5] Ante, secs. 24 p. 151, 46 p. 336, 62; Smelzer *v.* Lockhart, 97 Ind. 315; Krutz *v.* Howard, 70 Ind. 174, 179; Shoemaker *v.* Smith, 74 Ind. 71, 76; Freeman on Judg., sec. 146.

[6] 12 Am. & Eng. Enc. of Law, 52; McCauley *v.* Weller, 12 Cal. 500; People *v.* Williams, 24 Cal. 31; Sjorberg v. Nordin, 26 Minn. 501; 5 N. W. Rep. 677; Taylor *v.* Williams, 26 Tex. 583; People *v.* Mahoney, 18 Cal. 180.

The bias or feeling of favor or of hostility of the judge may arise from a cause which disqualifies, absolutely, such as interest in the result, having been of counsel in the cause, consanguinity or affinity or the like.[1] But in some of the cases the disqualification is extended to friendly or hostile relations caused by circumstances not affecting the personal interests of the judge or those connected with him.[2]

[1] Ante, sec. 62.

[2] "The friendly or hostile relations existing between a judge and one of the parties may be good ground of recusation: Voet, *ubi sup.*

"Of the first class, there are various circumstances referred to as examples indicating a state of feeling inconsistent with impartiality; as where the judge has received himself, or his near relative, important benefits or donations from one of the parties: Pothier, *ubi sup.;* where the relation of master and servant exists between the judge and a party: Pothier, *ubi sup.;* Smith *v.* Boston, etc., R. R., 36 N. H. 492; or where the relation of protection and subjection exists between the judge and a party, as in the case of a guardian and ward: Pothier, *ubi sup. Qui jurisdictioni præest neque sibi jus dicere debet, neque uxori vel liberis suis, neque libertis vel cæteris quos secum habet;* Dig. 2, 1, 10; Ersk. Inst., tit. 2, sec. 26; 1 Rolle Abr. 492; 6 Vin. Abr. 1, tit. Connusance, O. It is a good cause to remove a plea, that the bailiff who is the judge is of the robes of the plaintiff: 12 H. 4, 13; S. P. Brooke Abr., *Cause a remover,* pl. 13.

"But a creditor, lessee, or debtor may be judge in the case of his debtor, landlord, or creditor, except in cases where the amount of the party's property involved in the suit is so great that his ability to meet his engagements with the judge may depend upon the success of his suit: Pothier, *ubi sup.*

"Enmity, indicated by threats verbal or written, pending, or shortly preceding the suit, Voet and Pothier, *ubi sup.*, or otherwise, Turner *v.* Commonwealth, 2 Met. (Ky.) 619, and a lawsuit pending between a judge and a party, are good causes for recusation. Generally, such a lawsuit between a party and the nearest relative of the judge is not sufficient cause of recusation, though this may depend upon the state of feeling between the judge and the party, to which the lawsuit has given rise. The bitterness of feeling resulting from a lawsuit is supposed to subside when the lawsuit has terminated. A party can not disqualify a judge to sit in his case by bringing an action against him after the principal suit is commenced.

"Under this head falls the class of cases where a judge has a bias or prejudice in favor of or against one of the parties. Such bias, caused by hearing an *ex parte* statement of the facts of a case, would be a disqualification to try it. A judge, anxiously on his guard to hear nothing of the cases which may come before him, except what is said in court

But while such a state of friendly or hostile relation to one of the parties is sometimes made a cause of recusation by statute, and sometimes held to be sufficient cause for challenging the judge, independently of any statute on the subject, it is such an objection as may be waived by the parties; and if not made before issue joined, or, as held in some cases, before trial, the judgment or proceedings are valid, and can not thereafter be questioned on that ground.[1]

64. Liability of judge acting without jurisdiction.—If a judge acts to the injury of another, respecting a subject-matter over which he is wholly without jurisdiction, or where he has not jurisdiction of the person, he is liable as a trespasser for such acts.[2] But if he has jurisdiction of the subject-matter and of the person, and acts beyond, or in excess of his jurisdiction, he can not be held so liable.[3] Nor can he be held liable for error in judgment where he has jurisdiction, although such error may be shown to be the result of a lack of due care and prudence,[4] or where the act is shown to have been done maliciously or corruptly.[5]

and in presence of the adverse party, may yet find that he has been imposed upon by artful statements designed to create a prejudice in his mind relative to the case. In such a case, he may well decline to sit in the case. Williams *v.* Robinson, 6 Cush. 334; Rev. Stat., c. 176, sec. 22; Stat. 1855, c. 1659, sec. 23." Moses *v.* Julian, 45 N. H. 52; 84 Am. Dec. 114, 121.

[1] Ante, secs. 49, 62; Moses *v.* Julian, 45 N. H. 52; 84 Am. Dec. 114.

[2] Bradley *v.* Fisher, 13 Wall. 335; Lange *v.* Benedict, 73 N. Y. 12; 29 Am. Rep. 80; Lancaster *v.* Lane, 119 Ill. 242; Inos *v.* Winspear, 18 Cal. 397.

[3] Bradley *v.* Fisher, 13 Wall. 335; Stewart *v.* Cooley, 23 Minn. 347; 23 Am. Rep. 690, 692, note; Lancaster *v.* Lane, 119 Ill. 242; Yates *v.* Lansing, 5 Johns. (N. Y.) 282; 6 Am. Dec. 290; Taylor *v.* Doremus, 16 N. J. Law, 473; Grove *v.* Van Duyn, 44 N. J. Law, 654; 43 Am. Rep. 412.

[4] Ayres *v.* Russell, 3 N. Y. Supl. 338; Merwin *v.* Rogers, 2 N. Y. Supl. 396; Turpen *v.* Booth, 56 Cal. 65; 38 Am. Rep. 48.

[5] Bradley *v.* Fisher, 13 Wall. 335; Merwin *v.* Rogers, 2 N. Y. Supl. 396; Taylor v. Doremus, 16 N. J. Law, 473; Pratt *v.* Gardner, 56 Mass. (2 Cush.) 63; 48 Am. Dec. 652; Turpen *v.* Booth, 56 Cal. 65; 38 Am. Rep. 48; Pickett *v.* Wallace, 57 Cal. 555.

"Nor can this exemption of the judges from civil liability be affected

The test of liability, or the dividing line between such wrongful or erroneous acts as are actionable or not, is that which distinguishes judgments or proceedings which are absolutely void for want of jurisdiction, and such as are merely voidable or erroneous.[1] But immunity from civil action, where the act appears to have been corruptly or maliciously done, does not extend to *quasi* judicial officers, such as assessors of land for taxation and the like.[2] And a judge may be held liable for a willful and malicious conspiracy with others to prosecute, through his court, an innocent party, although his acts in court, in furtherance of such conspiracy, are not actionable.[3]

by the motives with which their judicial acts are performed. The purity of their motives can not in this way be the subject of judicial inquiry. This was adjudged in the case of Floyd and Barker, reported by Coke, in 1608 (12 Coke, 25), where it was laid down that the judges of the realm could not be drawn in question for any supposed corruption impeaching the verity of their records, except before the king himself, and it was observed that if they were required to answer otherwise, it would 'tend to the scandal and subversion of all justice, and those who are the most sincere would not be free from continual calumniations.'" Bradley *v.* Fisher, 13 Wall. 335.

[1] Bradley *v.* Fisher, 13 Wall. 335.

"The general rule, which applies to all such cases, and which is to be observed in this, has been in olden times stated thus: Such as are by law, made judges of another, shall not be criminally accused, or made liable to an action for what they do as judges; to which the Year Books (43 Edw. 3, 9; 9 Id. 4, 3) are cited in Floyd *v.* Baker (12 Coke, 26). The converse statement of it is also ancient; where there is no jurisdiction at all, there is no judge; the proceeding is as nothing (Perkin *v.* Proctor, 2 Wilson, 382–384), citing the Marshalsea case (10 Coke, 65–76), which says: 'Where he has no jurisdiction, *non est judex.*' It has been stated thus, also: No action will lie against a judge, acting in a judicial capacity, for any errors which he may commit, in a matter within his jurisdiction. (Gwynne *v.* Pool, Lutw. 290.) It has been, in modern days, carried somewhat further, in the terms of the statement: Judges of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously and corruptly. (Bradley *v.* Fisher, 13 Wall. 351.)" Lange *v.* Benedict, 73 N. Y. 12, 25; 29 Am. Rep. 80.

[2] Cooley on Torts, 411; Elmore *v.* Overton, 104 Ind. 548; 54 Am. Rep. 343.

[3] Stewart *v.* Cooley, 23 Minn. 347; 23 Am. Rep. 690.

If a judge is called upon to decide whether, under a given state of facts, he should act or not, and he has power to determine such question, the fact that he determines this preliminary question wrongly, and follows it by acting where he has in fact no jurisdiction to proceed, does not render him liable. The determination of the preliminary question is a judicial act, and what follows is the execution of a merely erroneous decision, for which he can not be held personally responsible.[1] But it is different where no facts are shown to authorize the assump-

[1] Ayers *v.* Russell, 3 N. Y. Supl. 338; Bocock *v.* Cochran, 32 Hun (N. Y.), 521, 523; Stewart *v.* Hawley, 21 Wend. 552; Clark *v.* Spicer, 6 Kan. 440.

"The defendant, the recorder, had the powers of a judge of a court of record. His approval of the certificate of the physician was a judicial act. It was an act analogous to the issuing of a warrant for the arrest of an alleged criminal upon information verified by oath. If the information fills the requirements of the statute, the magistrate's jurisdiction is complete. But the information may be incomplete in fact. Some essential specified in the statute may be omitted. The magistrate may not be learned in the law, or, if learned, not always sound in judgment. He looks at this information, and decides that a case exists, when in fact and in law there is no case. He issues his warrant when he ought not, and the result is that a man who has committed no crime, and against whom no crime is alleged, is arrested, and temporarily deprived of his liberty. In one aspect of the case the magistrate had no jurisdiction, because the law gives him no jurisdiction to issue a warrant unless it appears that an offense has been committed, and there is reasonable cause to believe that the accused committed it. A judge upon *habeas corpus* ought to decide that the magistrate had no jurisdiction to issue the warrant. Why, then, can not the magistrate be pursued by the injured individual? Because, when the information was presented to him, it was his duty to decide what his duty was respecting it. He had jurisdiction of that question, and his wrong decision upon it was a judicial error. He had a duty to perform, and the law does not punish him for a mistake in trying to do it right. In Lange *v.* Benedict, 73 N. Y. 35, the judge pronounced a sentence which he had no jurisdiction to pronounce, but he supposed he had, and it was his duty to decide whether he had or not. He had the statute for his guide; but he had to interpret the statute, and he did not interpret it aright. But he had to decide; he was no mere volunteer. He made a mistake; but he made it in the discharge of his master's (the government's) business, and his wrongful act was the government's, not his own, and he incurred no personal liability." Ayers *v.* Russell, 3 N. Y. Supl. 338, 340.

tion of jurisdiction, as in that case the question of the sufficiency of the facts does not arise, and there is nothing to decide and no foundation whatever for subsequent acts done.[1]

It has been held that where a justice of the peace is authorized to issue his warrant only upon a complaint in writing being filed charging a person with the commission of an offense, and a warrant is issued upon a complaint charging a bare trespass, and not a public offense, the justice issuing the warrant is liable to a civil action therefor.[2] But this does not accord with the rule as above stated, nor with the weight of authority on the subject. It was for the justice to decide whether the facts charged in the complaint constituted an offense or not, and for an error in his determination he should not be held liable.

The protection accorded extends only to such acts as are done by a judge, as such, and in his judicial capacity.[3] And in some of the cases the rule is confined to judges of courts of superior jurisdiction.[4] So in other cases a judge of a court of inferior or limited jurisdiction is held to be liable for an act done in excess of his jurisdiction.[5] But we apprehend that at the present day the protection extends equally to courts of inferior or limited jurisdiction, under the same circumstances, although the manner of establishing the jurisdiction of the two classes of courts

[1] Blodgett *v.* Race, 18 Hun, 132; Bocock *v.* Cochran, 32 Hun, 521, 523; Truesdell *v.* Combs, 33 Ohio St. 186.

[2] Truesdell *v.* Combs, 33 Ohio St. 186, 192.

[3] "It is to be seen that in these different modes of stating the principle, there abides a qualification. To be free from liability for the act, it must have been done as judge, in his judicial capacity; it must have been a judicial act. So it always remains to be determined, when is an act done as judge, in a judicial capacity? And this is the difficulty which has most often been found in the use of this rule, and which is present here; to determine when the facts exist which call into play that qualification." Lange *v.* Benedict, 73 N. Y. 12, 25; 29 Am. Rep. 80.

[4] Bradley *v.* Fisher, 13 Wall. 335; Lange *v.* Benedict, 73 N. Y. 12, 27; 29 Am. Rep. 80.

[5] Piper *v.* Pearson, 68 Mass. (2 Gray), 122; 61 Am. Dec. 438; Clarke *v.* May, Id. 410; 61 Am. Dec. 470; Truesdell v. Combs, 33 Ohio St. 186.

may be different.[1] It is not necessary that the facts shown in the particular action bring the case within the jurisdiction of the court or state a cause of action. It is enough if the court or judge has jurisdiction, generally, of the subject-matter to which the action relates.[2]

The immunity of judges from civil actions for acts done by them is not so much out of consideration for them as for the position they occupy and the functions they exercise. It is to preserve the independence and authority of the judiciary, and preserve its respect.[3] The exemption is

[1] Ante, secs. 20, 22, 23, 25; Merwin *v.* Rogers, 2 N. Y. Supl. 396; Cooley on Torts, 408-410; Lancaster *v.* Lane, 19 Ill. 242; Bocock *v.* Cochran, 32 Hun (N. Y.), 521; Fausler *v.* Parsons, 6 W. Va. 486, 491; 20 Am. Rep. 431; Yates *v.* Lansing, 5 Johns. (N. Y.)282, 292; East River Gas L. Co. *v.* Donnelly, 25 Hun, 614; Pratt *v.* Gardner, 56 Mass. (2 Cush.) 63; 48 Am. Dec. 652.

[2] Ante, sec. 8; Hunt *v.* Hunt, 72 N. Y. 217, 228; 37 Am. Dec. 130; Lange *v.* Benedict, 73 N. Y. 12, 27; 29 Am. Rep. 80.

"Jurisdiction of the subject-matter is power to adjudge concerning the general question involved, and is not dependent upon the state of facts which may appear in a particular case arising, or which is claimed to have arisen, under that general question. One court has jurisdiction in criminal cases; another in civil cases; each in its sphere has jurisdiction of the subject-matter. Yet the facts, the acts of the party proceeded against, may be the same in a civil case as in a criminal case—as, for instance, in a civil action for false and fraudulent representations and deceit, and in a criminal action for obtaining property by false pretenses. We should not say that the court of civil powers had jurisdiction of the criminal action, nor *vice versa*, though each had power to pass upon allegations of the same facts. So that there is a more general meaning to the phrase '*subject-matter*" in this connection, than power to act upon a particular state of facts. It is the power to act upon the general, and, so to speak, the abstract question, and to determine and adjudge whether the particular facts presented call for the exercise of the abstract power." Hunt *v.* Hunt, 72 N. Y. 217, 229; 37 Am. Dec. 130.

[3] Fausler *v.* Parsons, 6 W. Va. 486, 490; 20 Am. Rep. 431.

"The doctrine that an action will not lie against a judge for a wrongful commitment, or for an erroneous judgment, or for any other act made or done by him in his judicial capacity, is as thoroughly established as are any other of the primary maxims of the law. Such an exemption is absolutely essential to the very existence, in any valuable form, of the judicial office itself; for a judge could not be either respected or independent if his motives for his official actions or his conclusions, no matter how erroneous, could be put in question at the instance of every malignant or disappointed suitor. Hence we find this

for the benefit of the public, and not merely for the protection of the judge.[1]

Where a judge, once having jurisdiction, has been deprived of it, for example, by a change of venue, he is liable, if he proceeds further in the action, the same as if he had acted without jurisdiction from the beginning.[2]

judicial immunity has been conferred by the laws of every civilized people." Grove *v.* Van Duyn, 44 N. J. Law, 656; 43 Am. Rep. 412.

[1] Randall *v.* Brigham, 7 Wall. 523. [2] Hatch *v.* Galvin, 50 Cal. 441.

CHAPTER VI.

COMMON LAW, EQUITY, AND STATUTORY JURISDICTION.

65. Generally.
66. Constitutional jurisdiction.
67. Probate jurisdiction.
68. Special cases and proceedings.
69. Criminal jurisdiction.
70. Maritime jurisdiction.
71. Impeachment.
72. Contempts.
73. Divorce.
74. Attachments.
75. Garnishment.
76. Sales of real estate.
77. Arbitration.
78. *Ne exeat* and arrest and bail.
79. Injunctions.
80. Mandamus.
81. Prohibition.
82. *Habeas corpus.*
83. *Quo warranto.*
84. New trials and vacation of judgments.
85. Writs of error.
86. *Certiorari.*
87. Bills, and Writs, of review.
88. Appeals.
89. Naturalization.
90. Pardons.

65. GENERALLY.—To attempt, at the present day, to separate the common law, equity, constitutional, and statutory jurisdiction of courts and treat of each, independently of the other, would lead to unnecessary and useless repetition and consequent confusion. These different kinds of jurisdiction have been so intermingled by constitutional and statutory provisions that the common law or equity can no longer be treated, in considering this subject, as a separate body of laws or rules of procedure. Such rules have been so added to here, and modified there,

by legislation, that the common law and equity rules affecting jurisdiction can no longer be said to exist independently of such legislation. In many cases courts of general jurisdiction are vested by constitutional or statutory provisions with common law and equity jurisdiction.[1] In such cases we must, although jurisdiction is given by express legislative enactment, look to the common law and equity to ascertain the extent and nature of the jurisdiction thus granted.[2]

A grant of common law jurisdiction has been held to include not merely suits which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined in contradistinction to those where equitable rights alone were regarded and equitable remedies were administered; or where, as in the admiralty, a mixture of public law and of maritime law and equity was often found in the same suit,[3] and includes criminal actions which are cases at law.[4]

The grant of jurisdiction under the codes is sometimes measured by the "civil action" as defined by such codes. In many cases the jurisdiction of courts is specifically defined, without reference to the common law, or equity, and yet the jurisdiction thus granted is in its nature the same as existed in the common law and equity courts of England. And remedies are provided by statute that could not have been administered by either a common law or equity court under their general jurisdiction, as it existed without the aid of statutory provisions.[5] In still other cases the common law and equity rules affecting jurisdiction are designedly modified, enlarged, or limited by legislative enactment.

[1] Bouton *v.* City of Brooklyn, 7 How. Pr. 198, 205; Chumasero *v.* Potts, 2 Mont. 242; Territory *v.* Flowers, 2 Mont. 531; Parsons *v.* Bedford, 3 Pet. 433.

[2] Bouton *v.* City of Brooklyn, 7 How. Pr. 198.

[3] Parsons *v.* Bedford, 3 Pet. 433, 446; Territory *v.* Flowers, 2 Mont. 531.

[4] Territory *v.* Flowers, 2 Mont. 531.

[5] Folger *v.* Columbia Ins. Co., 99 Mass. 267, 274.

Statutes have provided different methods of obtaining equitable relief, particularly as respects what is sometimes called the assistant jurisdiction of courts of chancery, as in case of discovery and the like.[1] And in all of these cases the jurisdiction is really statutory, although it is measured in some cases by common law and equity rules.

The tendency of the courts, and particularly of the federal courts, seems to be to extend and broaden their equitable jurisdiction by a most liberal construction of the laws and usages fixing and defining their powers.[2]

Formerly the common law and equity courts were entirely separate and independent courts, and neither could exercise any jurisdiction belonging to the other. But now, in most of the states, and in England, these courts have been consolidated into one; the distinctions between common law and equity actions, and the practice relating thereto, have been abolished; and one court of general common law and equity jurisdiction has been substituted, to which jurisdiction over all cases at law and in equity has been given.[3]

This being so, the question whether the jurisdiction is at law or in equity has ceased to be of much practical importance in most of the states as a mere question of jurisdiction in the particular court. But as affecting the question of the remedy to be administered, the distinction between common law and equity causes of action can never cease to be important.[4] However, it is believed that a general statement of the kind and character of the two classes of jurisdiction is all that is necessary in a work of this kind. The subject has received attention in the chapter on courts,[5] and in the section on the different kinds of jurisdiction.[6]

[1] *Ante*, sec. 18, p. 74; Lamaster *v.* Scofield, 5 Neb. 148; Town of Venice *v.* Woodruff, 62 N. Y. 462.

[2] Toledo, A. A. & N. M. Ry. Co. *v.* Pennsylvania Co., 54 Fed. Rep. 730, 746; United States *v.* Workingmen's Amalg. Council, 54 Fed. Rep. 994.

[3] *Ante*, secs. 2, 3, 4.

[4] *Ante*, sec. 8, p. 22; secs. 9, 18.

[5] *Ante*, secs. 2, 3, 4.

[6] *Ante*, sec. 9; see also *ante*, sec. 18; Foulks Ac. in Sup. Ct. 27–38.

The sections cited would seem to show, sufficiently for our present purpose, the general nature of the two classes of jurisdiction.[1]

In some of the states the common law, or parts of the common law, as the case may be, has been expressly adopted as the law of such states. And if this has not been done it is sometimes held that if the question arises in another state it will be presumed, in the absence of proof to the contrary, that the common law prevails in a sister state.[2] But, generally, it is held that, in the absence of proof, the law of a sister state will be presumed to be the same as the law of the state in which the question arises whether it be the common law or not.[3]

Where a statute and the common law conflict, the statute must prevail, unless there is some constitutional provision to prevent it. But if general common law and equity jurisdiction is vested in a court by the constitution such jurisdiction can not be taken away or limited by statute.[4] And this mode of conferring jurisdiction upon courts of general jurisdiction is quite common.[5] But unless the right has been preserved by some constitutional provision the common law may be changed at will by statute, and jurisdiction given by a general reference to the common law and equity may be taken away or changed at any time.[6]

[1] But see on this point the following sections on the different common law and equity writs: Story's Eq. Pl., sec. 472; Town of Venice *v.* Woodruff, 62 N. Y. 462.

[2] Norris *v.* Harris, 15 Cal. 226.

[3] Marsters *v.* Lash, 61 Cal. 622; Monroe *v.* Douglass, 5 N. Y. 447; Hynes *v.* McDermott, 82 N. Y. 41, 47.

[4] *Ante*, sec. 24, p. 146; *post*, sec. 66; People *v.* Nichols, 79 N. Y. 582.

[5] *Ante*, sec. 10.

[6] Munn *v.* Illinois, 94 U. S. 113, 134; Wellman *v.* Chicago & G. T. Ry. Co., 83 Mich. 592; 47 N. W. Rep. 489, 495.

"A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law can not be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will, or even at the whim, of the legislature, unless prevented by constitutional

It will be presumed, however, that it was the intention of the legislature that the common law should prevail, unless it has expressly provided to the contrary.[1]

The federal courts have no common law jurisdiction except as the same is conferred upon them by the constitution or acts of congress.[2]

limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances." Munn *v.* Illinois, 94 U. S. 113, 134.

[1] Clark *v.* Clark, 17 Nev. 124; 28 Pac. Rep. 238.

[2] *Ante*, sec. 10; In re Barry, 42 Fed. Rep. 113; Ex parte Burrus, 136 U. S. 586; 10 Sup. Ct. Rep. 850; In re Booth, 3 Wis. 157.

"This reasoning, however, may not be supposed to meet fully the case presented by the petitioner; for although, in the abstract, there may be no prerogative authority in the head of the United States government, yet the argument would maintain that its courts of justice, as organized, may possess all the powers exercised by superior courts at common law, and the issuing and acting upon writs of *habeas corpus ad subjiciendum* become thereby a branch of jurisdiction necessarily incident to the constitution of such courts. This hypothesis overlooks the peculiar foundation of the United States judiciary, and the allotment of its functions in respect to the powers of the states. The federal government came into force co-ordinately with, or as the concomitant of, state governments at the time existing, and in the full exercise of legislative, executive, and judicial sovereignty. These sovereignties are left entire, under the action of the general government, except in so far only as the powers are transferred to the federal head by the constitution, or are by that prohibited to the states, or, in some few instances, are allotted to be exercised concurrently by the two governments. The United States judiciary is constituted and put in action in the several states, in subordination to this fundamental principle of the Union, and empowered to exercise only such peculiar and special supremacy, and not one in its absolute sense. To render this connection of the United States judiciary with that of the states more intimate and entire, and to take away all implication that it was a paramount power, acting irrespective of state laws, or that it possessed, or could exercise, any inherent jurisdiction countervailing those laws, the act of congress organizing the courts establishes it as an element in their procedure that the laws of the state where the court sits shall be its rule of decision in common law cases. It necessarily results, as a consequence of this special character of the United States judiciary, that it can possess no powers other than those specifically conferred by the constitution or laws of the Union, and such incidents thereto as are necessary to the proper execution of its jurisdiction. All other judicial powers necessary to the complement of supreme authority remain with, and are exercised by, the states. This doctrine is sufficiently indicated in the decision of the

Frequently a cause of action is given by statute which could not have been maintained either at common law or in equity. In such cases the jurisdiction is regarded as

Supreme Court made in this case at the last term, and it has been invariably recognized from the earliest adjudications of the court. Chisholm *v.* Georgia, 2 Dall. 432, 435; Ex parte Bollman, 4 Cranch, 75; Ex parte Watkins, 3 Pet. 201; Kendall *v.* U. S., 12 Pet. 524. The jurisdiction of the United States courts depends exclusively on the constitution and laws of the United States, and they can neither in criminal nor civil cases resort to the common law as a source of jurisdiction. U. S. *v.* Hudson, 7 Cranch, 32; U. S. *v.* Coolidge, 1 Wheat. 415; Chisholm *v.* Georgia, 2 Dall. 432; Ex parte Bollman, 4 Cranch, 75; Town of Pawlett *v.* Clark, 9 Cranch, 333; Ex parte Randolph, 2 Brock. 477; Craig v. Missouri, 4 Pet. 444; Wheaton *v.* Peters, 8 Pet. 658; The Orleans *v.* Phoebus, 11 Pet. 175; Kendall *v.* U. S., 12 Pet. 524.

"It is now argued that this principle is limited to the Supreme Court, but that, in respect to the circuit courts, they have a common law jurisdiction incident to their constitution, inasmuch as judicial sovereignty resides in them, rendering the range of their original jurisdiction coextensive with the subjects of litigation arising under the constitution and laws of the United States, and because all remedies not otherwise provided are, in the exercise of that judicial sovereignty, to be in conformity to the common law. Although the speculations of our most eminent jurists may countenance this argument (Dup. Jur. 85; 1 Kent, Comm. 341), yet it has not received the sanction of the United States courts. Chisholm *v.* Georgia, 2 Dall. 435; Kendall *v.* U. S. 12 Pet. 616, *per curiam*, and 626, Chief Justice Taney; Ex parte Bollman, 4 Cranch, 75; Chief Justice Marshall, Ex parte Randolph, 2 Brock. 477; Lorman *v.* Clarke, 2 McLean, 569. The distinction established by the cases is clear and practical, and embraces all United States courts alike; and is, in effect, that those courts derive no jurisdiction from the common law, but that, in those cases in which jurisdiction is appointed by statute, and attaches, the remedies in these courts are to be according to the principles of the common law. Bains *v.* The James and Catherine, 1 Baldw. 558; Robinson *v.* Campbell, 3 Wheat. 223; U. S. *v.* Hudson, 7 Cranch, 32; Ex parte Kearney, 7 Wheat. 38; Anderson *v.* Dunn, 6 Wheat. 204; Ex parte Randolph, 2 Brock. 477. It is not, accordingly, conclusive of their right to take cognizance of the subject-matter, to show that the parties connected therewith are competent to sue or be sued in the United States courts, and that there is a perfect right of action or defense thereupon supplied such parties at common law. The evidence must go further, and prove that the particular subject-matter is one over which the courts are by act of congress appointed to act, or that the question has relation to the remedy alone, and not the jurisdiction of the court. U. S. *v.* Bevans, 3 Wheat. 389; McCulloch *v.* Maryland, 4 Wheat. 407; Rhode Island *v.* Massachusetts, 12 Pet. 721." In re Barry, 42 Fed. Rep. 113, 120.

exceptional, and the party asserting a right under the statute is required to bring himself within its provisions by the allegations of his complaint.[1]

The courts speak of this rule as if it were exceptional. It is presumed, however, that if the cause of action attempted to be alleged is one that could be enforced in a common law or chancery court, the allegations of the complaint, declaration, or bill, must bring the case within some rule of law or equity, that would entitle the complainant to relief. And why any different or more stringent rule should prevail where the cause of action is purely statutory, no satisfactory reason has ever been given, and probably never will be.

It will be seen from these general observations that these different classes of jurisdiction have so far been merged in each other, and changed and modified by statutory enactments as to render a separate consideration of each not only unnecessary but inadvisable.

It has been thought best to consider, rather, the present law of jurisdiction, as affecting the different classes of subjects, and the different writs that may be issued, as the same exist at the present time whether by force of the common law, equity, or constitutional and statutory provisions, or any or all of them. And this will be done, as far as it is thought to be necessary and advisable, in the following sections of this chapter.

The jurisdiction of the federal courts will be considered with that of the state courts under each subject.

66. CONSTITUTIONAL JURISDICTION. In most of the states in this country the jurisdiction of courts of general and superior jurisdiction is fixed and defined by the constitution. This is usually done by conferring upon such courts, in general terms, jurisdiction in all cases at law and in equity. But not infrequently the extent of jurisdiction is specifically defined and limited.[3]

[1] Boys *v.* Simmons, 72 Ind. 593.

[3] *Ante*, sec. 65.

There is nothing peculiar about the jurisdiction thus conferred, as distinguished from that conferred by legislative enactment, except that it can not be taken away, changed, or modified by statute.[1] Nor where jurisdiction is limited in terms to specific cases or classes of cases by the constitution can such jurisdiction be extended to other cases by statute.[2] But where the judicial power of the state is vested by the constitution in certain designated courts "and such other courts as may be established by law," the jurisdiction is not exclusive in the courts named, and other courts may be created and given like jurisdiction with those named in the constitution.

But it has been held that under such a constitutional provision no court can be created that is not subject to the "superintending control" of the Supreme Court created by the constitution.[3]

What is meant in constitutional provisions granting jurisdiction in "cases at law," or "common law jurisdiction," has been the subject of some contention. The use of the phrase has been given its broadest meaning by the courts, and held to include not only such of the common law actions as were designated and known by name as such, but also all cases, legal in their nature, as contradistinguished from equity and admiralty cases, and such as are within the cognizance of military courts or courts martial, and including criminal cases.[4]

[1] *Ante*, sec. 24; Wilson *v.* Roach, 4 Cal. 362; People *v.* Nichols, 79 N. Y. 582; Hutkoff *v.* Demorest, 103 N. Y. 377; 8 N. E. Rep. 899; In re Booth, 3 Wis. 157; Chumasero *v.* Potts, 2 Mont. 242; Appeal of Houghton, 42 Cal. 35; State *v.* Butt, 25 Fla. 258; 5 Sou. Rep. 597. But see Anderson *v.* Commonwealth, 3 S. W. Rep. 127; Stapleton *v.* Commonwealth, 3 S. W. Rep. 793.

[2] Western Union Tel. Co. *v.* Taylor, 84 Ga. 408; 11 S. E. Rep. 396.

[3] People *v.* Richmond, 26 Pac. Rep. 929.

[4] *Ante*, sec. 65; Parsons *v.* Bedford, 3 Pet. 433.

"All wrongs are legal injuries. Common law courts, then, have for one of their objects the redress of public wrongs, or, in other words, the punishment of crimes. A court having common law jurisdiction has the same jurisdiction as common law courts. The only meaning that can be derived from the phrase 'common law jurisdiction,' is the right to hear and determine cases at common law. This is what com-

But there are certain cases or proceedings created by statute which have, unfortunately, and it is believed erroneously, been held to belong to none of these general and

mon law courts were instituted for. It is believed that the language used in our Organic Act, 'common law jurisdiction,' was intended to vest in the district courts and Supreme Court of the territory the same jurisdiction as was possessed by all the superior common law courts of England. The judicial system that prevailed in most of the states at the time the Organic Act was enacted by congress (of which the one for this territory is a copy), included one court having jurisdiction of all common law causes, civil and criminal, and that the intention of congress at that time, and when our Organic Act was passed, was to provide for a judicial system similar to that which had prevailed in most of the states, and which the great mass of the citizens of the United States were familiar with. Even while the oldest states were colonies of Great Britain, they never had a judicial system that coincided with that of the mother country. Generally, with them, one court had all of the original jurisdiction that was possessed by the several superior courts of common law in England, and this was said to possess common law jurisdiction. See Graham on Jurisdiction, 139, 140, as to the jurisdiction of the Supreme Court of New York when that state was a colony. And here we have the origin of this phrase. A court that had common law jurisdiction had the right to hear and determine every case that did not fall within the classes known as suits in equity or admiralty, or matters of which a court-martial took cognizance. It had the same jurisdiction as the combined jurisdictions of the several superior common law courts of England. When a new legal right was created, or a legal wrong proscribed, it was not necessary to pass a statute giving any court jurisdiction of the same, for a court having a common law jurisdiction had so general and enlarged a jurisdiction of all legal remedies, that it could take cognizance of any action involving the determination of the same. In the case of Parsons *v.* Bedford, 3 Pet. 433, it was held that suits at common law, as specified in the seventh amendment to the constitution of the United States, included all suits not of equity or admiralty jurisdiction, and was not confined to cases which were known to the old and settled proceedings at the common law. Suits a tcommon law signify nothing more than cases at law. This is undoubtedly the proper construction of the phrase 'common law,' as used in our Organic Act. Actions at common law signified formerly every case not of equity or admiralty jurisdiction, or cases within the cognizance of a court-martial. Now cases at law occupy the same position. They embrace every class of cases not of one of these jurisdictions. If we take the above decision as a guide, cases at law and cases at common law are convertible terms, when applied to the jurisprudence of the United States. Both are used to designate a class of cases that are not known as equity or admiralty suits, or matters within the cognizance of courts-martial. Once this class of cases was known as cases at common law,

well known heads of jurisdiction, or to be included in "cases at law," "suits in equity," or the "civil action" of the codes. They have been, by judicial decisions in some of the states, put into a class by themselves, and denominated "special cases" or "special proceedings."[1] While such a distinction has no doubt been countenanced by the language of constitutional and statutory provisions in some of the states, it is one that does not really exist, and its recognition has led to much unnecessary confusion. In the nature of things, a cause of action falls within one or the other of the well defined classes of jurisdiction above mentioned, and the attempt to create a new class of actions or proceedings governed by different rules affecting jurisdiction and procedure must be regarded as a mistake. The civil action of the code should be held to include every judicial proceeding the object of which is to assert a civil right or obtain a civil remedy.[2]

now cases at law. Whenever, then, a case is known as one at law, or at common law, any court whose jurisdiction is described by the language, 'law or common law,' can take cognizance of it. A criminal action is one at law. It is a public wrong which is redressed by an action in the name of the people in their collective or aggregate capacity. A private wrong is redressed in the name of the party injured. An indictment with us is nothing but a pleading on the part of the territory. From a review of the common law writers, it will be seen that a criminal action is always classed as one at law. Chitty's Blackstone, bk. 3, pp. 1, 2; Id., bk. 4, p. 4. 'For pleas or suits are regularly divided into two sorts, pleas of the Crown, which comprehend all crimes and misdemeanors, wherein the king, on behalf of the public, is the plaintiff; and common pleas, which include all civil actions depending between subject and subject.' Chitty's Blackstone, bk. 3, p. 40. Other authorities might be cited to the same point. An interpretation of this clause in our Organic Act has been made by the Supreme Court of the United States in the case of Ferris *v.* Higley, 20 Wall. 375. In referring to the language, 'common law jurisdiction,' which occurs in the ninth section of the Organic Act of Utah (which section is the same as that of our Organic Act), the court says: 'The common law and chancery jurisdiction here conferred on the district and supreme courts is a jurisdiction very ample and very well understood. It includes almost every matter, whether of a civil or criminal cognizance, which can be litigated in a court of justice." Territory v. Flowers, 2 Mont. 531, 533.

[1] *Post*, sec. 68; Appeal of Houghton, 42 Cal. 35, 56; Parsons *v.* Tuolumne Co., 5 Cal. 43; 63 Am. Dec. 76.

[2] As to the meaning of the terms "controversies" and "cases," as used

Where jurisdiction has been given by the constitution, but the procedure, or means of calling for or exercising such jurisdiction, has not been provided by the legis-

in the constitution of the United States, see In re Pacific Ry. Com., 32 Fed. Rep. 241, 255, in which it was said: "The judicial article of the constitution mentions cases and controversies. The term 'controversies,' if distinguishable at all from 'cases,' is so in that it is less comprehensive than the latter, and includes only suits of a civil nature. Chisholm *v.* Georgia, 2 Dall. 431, 432; 1 Tuck. Bl. Comm. App. 420, 421. By cases and controversies are intended the claims of litigants brought before the courts for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs. Whenever the claim of a party under the constitution, laws, or treaties of the United States takes such a form that the judicial power is capable of acting upon it, then it has become a case. The term implies the existence of present or possible adverse parties whose contentions are submitted to the court for adjudication.

"In Osborn *v.* U. S., 9 Wheat. 819, the Supreme Court, speaking by Chief Justice Marshall, after quoting the third article of the constitution declaring the extent of the judicial power of the United States, said:

"'This clause enables the judicial department to receive jurisdiction to the full extent of the constitution, laws, and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it. *That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law.* It then becomes a case, and the constitution declares that the judicial power shall extend to all cases arising under the constitution, laws, and treaties of the United States.'

"In his Commentaries on the Constitution, Mr. Justice Story says: 'It is clear that the judicial department is authorized to exercise jurisdiction to the full extent of the constitution, laws, and treaties of the United States, whenever any question respecting them shall assume such a form that the judicial power is capable of acting upon it. *When it has assumed such a form, it then becomes a case; and then, and not till then, the judicial power attaches to it.* A case, then, in the sense of this clause of the constitution, arises when some subject touching the constitution, laws, or treaties of the United States is submitted to the courts by a party who asserts his rights in the form prescribed by law.'

"And Mr. Justice Story refers in a note to the speech of Marshall on the case of Robbins, in the house of representatives before he became chief justice, which contains a clear statement of the conditions upon which the judicial power of the United States can be exercised. His language was:

"'By extending the judicial power to all cases in law and equity, the constitution has never been understood to confer on that department any political power whatever. To come within this description, a ques-

lature, the court may provide for such procedure by its own rules.[1]

Where power is given by the constitution to issue certain writs, the office of which is well defined at common law, the legislature can not change the objects for which such writs may be issued, and thereby change the constitutional jurisdiction of the court.[2]

Jurisdiction conferred by the constitution is not exclusive, unless made so in express terms, and, therefore, while the jurisdiction thus given can not be taken away by the legislature, it may be conferred by statute upon another court concurrently with the one exercising constitutional jurisdiction.[3]

67. PROBATE JURISDICTION.—Formerly, jurisdiction of matters growing out of the administration of estates of deceased persons in England belonged to the county courts, then to the ecclesiastical courts, and courts of chancery, and later to the probate courts,[4] strictly probate jurisdiction being vested in the county courts, and later in the ecclesiastical courts.[5] But the jurisdiction of the ecclesiastical courts was confined to wills of personal property.[6] And now the entire jurisdiction growing out of the settlement of estates is vested in the supreme court, the probate court being merged in that court under the probate, divorce, and admiralty division.[7]

tion must assume a legal form for forensic litigation and judicial decision. There must be parties to come into court, who can be reached by its process, and bound by its power; whose rights admit of ultimate decision by a tribunal to which they are bound to submit.' "

[1] *Post*, sec. 88; People *v.* Jordan, 65 Cal. 644; 4 Pac. Rep. 683.

[2] *Post*, sec. 81; Camron *v.* Kenfield, 57 Cal. 550.

[3] *Ante*, sec. 24.

[4] Perris *v.* Higley, 20 Wall. 375; Green *v.* Creighton, 10 S. & M. (Miss.) 159; 48 Am. Dec. 742, 749, note; Sneed *v.* Ewing, 5 J. J. Mar. (Ky.) 460; 22 Am. Dec. 41.

[5] Townsend *v.* Townsend, 4 Cold. (Tenn.) 70; 94 Am. Dec. 184; Apperson *v.* Cottrell, 3 Porter (Ala.), 51; 29 Am. Dec. 239.

[6] Buchanan *v.* Matlock, 8 Humph. (Tenn.) 390; 47 Am. Dec. 622; Sneed *v.* Ewing, 5 J. J. Mar. (Ky.) 460; 22 Am. Dec. 41.

[7] *Ante*, sec. 3; Foulke's Ac. in Sup. Ct. 18, 38.

In this country, probate jurisdiction is vested by law in different courts in the different states. In some, probate courts are still maintained; in some, this jurisdiction is vested in county courts; in others, in district courts; in others, in surrogate courts; in others, in common pleas courts; in some, the courts exercising general jurisdiction in common law and equity cases are vested with the powers of probate courts, and in some of the states the jurisdiction is still retained by the court of chancery in part.[1] But at the present day the jurisdiction of courts, and the procedure in probate matters, are almost entirely regulated and controlled by constitutional and statutory provisions, and do not depend upon the modes of proceeding in the ecclesiastical courts of England. And in most of the states, the jurisdiction given to probate courts is much more broad and ample than the powers of the ecclesiastical courts.[2] And where probate jurisdiction is vested

[1] Stimson Am. Stat. Law, p. 119, sec. 556; Perris *v.* Higley, 20 Wall. 375; In re Burton, 93 Cal. 459; 29 Pac. Rep. 36; Pennie *v.* Roach, 94 Cal. 515; 29 Pac. Rep. 956; 30 Pac. Rep. 106; Green *v.* Creighton, 10 S. & M. (Miss.) 159; 48 Am. Dec. 742, 744, note; Apperson *v.* Cottrell, 3 Porter (Ala.), 51; 29 Am. Dec. 239.

"The jurisdiction over the probate of wills and granting administrations is peculiar. It was derived from the civil law through the ecclesiastical courts of England, and was granted by the province charter to the governor and council, who appointed judges of probate in the different counties as their delegates, from whom an appeal lay to them; and this appellate power was continued in the governor and council after the establishment of the state constitution until the end of the Revolution, when it was transferred to this court, still, however, keeping the probate jurisdiction distinct from those of common law and equity: Anc. Chart. 32; Governor Pownall's Message to his Council in 1760, Quincy, 573; Constitution of Massachusetts, c. 3, sec. 5; Stats. 1783, c. 46; Peters *v.* Peters, 8 Cush. 540–542. The jurisdiction of courts of probate in Massachusetts, differing in this respect from those of England and of some other states, includes wills of real estate as well as of personal property: Anc. Chart. 32; Laughton *v.* Atkins, 1 Pick. 549, and cases cited; R. S., c. 62, sec. 32, and commissioners' note; Gen. Stats., c. 92, sec. 38." Waters *v.* Stickney, 12 Allen, 1; 90 Am. Dec. 122.

[2] "We may admit the correctness of this doctrine as applied to a similar proceeding in the ecclesiastical courts of England, whose powers and jurisdictions are restricted to much narrower limits than the au-

in courts of general jurisdiction, it is usually held that proceedings in probate must be treated as distinct from its law and equity jurisdiction, and as if it were a separate and distinct court of probate.[1] And in many of the states, the jurisdiction given to probate courts is made exclusive.[2]

In almost if not quite all of the states, other than probate jurisdiction is granted to courts exercising the latter, so that it may be said that there is no court in any of the states exercising probate jurisdiction only, and therefore no probate courts, except in name, really exist. This is of little consequence, however, as respects the question of jurisdiction, for the reason that the question is the same, as to the powers of the court, respecting its probate jurisdiction, whether it is in fact a probate court or some other court exercising probate jurisdiction.

The standing of such courts, whether courts of special and inferior or of general and superior jurisdiction, as respects, particularly, the presumptions that will or will not be indulged in favor of their jurisdiction, has been a matter of no little controversy.[3]

It is generally held that they are courts of limited juris-

thority and jurisdiction of the courts of probates in this state. In the absence of statutory directions, it is found convenient to adopt the modes of proceeding observed by those courts. But in questions concerning the jurisdiction of the courts of probates, we do not refer to the ecclesiastical courts of England as an authoritative standard. The constitution of the state is the common source of the authority and powers of all our courts; and hence, in all questions in regard to the extent of their respective jurisdictions, must determine the controversy. The jurisdiction of the courts of probates over the estates of decedents was intended by the constitution to be full and ample, and has by this court been uniformly held to be, in the main, exclusive." McWillie *v.* Van Vacter, 35 Miss. 428; 72 Am. Dec. 127, 128.

[1] Lucich *v.* Medin, 3 Nev. 93; 93 Am. Dec. 376.

[2] McWillie *v.* Van Vacter, 35 Miss. 428; 72 Am. Dec. 127; Linsenbigler *v.* Gourley, 56 Pa. St. 166; 94 Am. Dec. 51; Townsend *v.* Townsend, 4 Cold. (Tenn.) 70; 94 Am. Dec. 184; Gaines *v.* Smiley, 7 S. & M. (Miss.) 53; 45 Am. Dec. 295.

[3] *Ante*, secs. 6, 7, 23, 25; Schultz *v.* Schultz, 10 Grattan, 358; 60 Am. Dec. 335, 353, note.

diction,[1] but that they are not inferior courts within the technical meaning of the term.[2] And that, when acting within their limited sphere, all presumptions in favor of their jurisdiction that would apply to the proceedings of courts of general and superior jurisdiction will be indulged.[3]

So recitals in the record showing service of notice or other facts necessary to give jurisdiction, can not be

[1] Propst *v.* Meadows, 13 Ill. 157; People *v.* Gray, 72 Ill. 343; People's Sav. Bank *v.* Wilcox, 15 R. I. 258; 3 Atl. Rep. 211; Bostwick *v.* Skinner, 80 Ill. 147; Masters *v.* Brinker, 87 Ky. 1; 7 S. W. Rep. 158; People *v.* Loomis, 96 Ill. 377; Snyder's Appeal, 36 Pa. St. 166; 78 Am. Dec. 372; Walters *v.* Stickney, 12 Allen, 1; 90 Am. Dec. 122; Schultz *v.* Schultz, 10 Grattan, 358; 60 Am. Dec. 335, 353; Redmond *v.* Collins, 4 Dev. (N. Car.), 430; 27 Am. Dec. 208.

[2] Davis *v.* Hudson, 29 Minn. 27; 11 N. W. Rep. 136; Camden *v.* Plain, 91 Mo. 117; 4 S. W. Rep. 86; People *v.* Gray, 72 Ill. 343; Propst *v.* Meadows, 13 Ill. 157, 169; Sheldon *v.* Newton, 3 Ohio St. 494, 500; Bostwick *v.* Skinner, 80 Ill. 147; People *v.* Cole, 84 Ill. 327; Succession of Bellande, 41 La. Ann. 491; 6 Sou. Rep. 505; Masters *v.* Brinker, 87 Ky. 1; 7 S. W. Rep. 158; Shroyer *v.* Richmond, 16 Ohio St. 455, 465; Shoemaker *v.* Brown, 10 Kan. 383; Townsend *v.* Townsend, 4 Cold. (Tenn.) 70; 94 Am. Dec. 184; Walters *v.* Stickney, 12 Allen, 1; 90 Am. Dec. 122, 136, note; Coltart *v.* Allen, 40 Ala. 155; 88 Am. Dec. 757; Andrews *v.* Avory, 14 Grattan, 229; 73 Am. Dec. 355; McPherson *v.* Cunliff, 11 Serg. & Raw. 422; 14 Am. Dec. 642, 663.

[3] *Ante*, sec. 25; Davis *v.* Hudson, 29 Minn. 27; 11 N. W. Rep. 136; People *v.* Gray, 72 Ill. 343; Sherwood *v.* Baker, 105 Mo. 472; 16 S. W. Rep. 938; Blair *v.* Sennott, 134 Ill. 78; 24 N. E. Rep. 969; People *v.* Cole, 84 Ill. 327; Rottman *v.* Schmucker, 94 Mo. 139; 7 S. W. Rep. 117; Shroyer *v.* Richmond, 16 Ohio St. 455, 465; In re Burton, 93 Cal. 459; 29 Pac. Rep. 36; Kimball *v.* Fisk, 39 N. H. 110; 75 Am. Dec. 213; Bush *v.* Lindsey, 24 Ga. 245; 71 Am. Dec. 117.

"Whether the decision of the county court was right or wrong, can not be inquired into here. The county court is a court of general jurisdiction, of unlimited extent, over a particular class of subjects, and, when acting within that sphere, its jurisdiction is as general as that of the circuit court. When, therefore, it is adjudicating upon the administration of estates, over which it has a general jurisdiction, as liberal intendments will be granted in its favor as would be extended to the proceedings of the circuit court, and it is not necessary that all the facts and circumstances which justify its action shall affirmatively appear upon the face of its proceedings. Propst *v.* Meadows, 13 Ill. 168; Mitchell *v.* Mayo, 16 Ib. 83." People *v.* Gray, 72 Ill. 343, 347.

contradicted by parol in a collateral proceeding.[1] And such a court, although one created by statute, and exercising purely statutory powers, would, if the act to be done were within the general jurisdiction of a common-law or chancery court, be treated, under this rule, as a court of general jurisdiction.

The rule itself is not to be commended, as it is believed that the distinction between common-law, equity, and statutory jurisdiction, thus maintained, does not exist in reason, but is the result of a purely arbitrary rule.[2] And the question does not always turn upon the character of the court, generally, but depends sometimes upon the nature of the act to be done in the particular case, it being held in some of the cases that where the court is exercising a power specially bestowed upon it by statute, it is a court of special and inferior jurisdiction and its authority to act must affirmatively appear on the face of its proceedings.[3]

There are not a few cases, however, which hold that they are inferior courts, and that their jurisdiction must affirmatively appear, and will not be presumed.[4] And

[1] Barnett *v.* Wolf, 70 Ill. 76; Moore *v.* Earl, 91 Cal. 632; 27 Pac. Rep. 1087.

[2] *Post*, sec. 68.

[3] *Ante*, sec. 25; Donlin *v.* Hettinger, 57 Ill. 348; Smith *v.* Westerfield, 88 Cal. 374; 26 Pac. Rep. 206; Root *v.* McFerrin, 37 Miss. 17; 75 Am. Dec. 49.

"We must be careful to separate, in our minds, the general powers of the probate court, as organized under the constitution, from those of the probate court exercising a special authority not derived from the constitution, but delegated by the legislature over a particular subject and under certain particular circumstances." Root *v.* McFerrin, 37 Miss. 17; 75 Am. Dec. 49, 56.

[4] *Ante*, secs. 6, 7; Gilliland *v.* Sellers, 2 Ohio St. 223; Detroit, L. & N. R. Co. *v.* Probate Judge, 63 Mich. 676; 30 N. W. Rep. 598; In re Hawley, 104 N. Y. 250, 261; 10 N. E. Rep. 352; Smith *v.* Westerfield, 88 Cal. 374; 26 Pac. Rep. 206; Haynes *v.* Meeks, 10 Cal. 110; 70 Am. Dec. 703; State *v.* Reigart, 1 Gill, 1; 39 Am. Dec. 628.

The California cases are in a state of hopeless conflict on this question. In Smith *v.* Westerfield, 88 Cal. 374, 378; 26 Pac. Rep. 206, the supreme court of that state said:

"Proceedings for the administration of the estates of deceased per-

others holding that while the jurisdiction of the court will be presumed its proceedings are not conclusive as to the jurisdiction of the court.[1]

Under these decisions, it makes no difference whether the court exercising probate jurisdiction is one of generul or of special jurisdiction. It is deemed to belong to the latter class of courts as respects its exercise of probate jurisdiction.[2]

Under the rule that probate courts stand on the same footing as courts of general jurisdiction, they are held to possess the power to set aside judgments rendered by them at any time during the term.[3]

sons, and for their distribution to those who may be entitled thereto, including the determination of the heirs of the decedent, are purely statutory. The superior court, *while sitting as a court of probate, has only such powers as are given it by the statute, and such incidental powers as pertain to all courts for the purpose of enabling them to exercise the jurisdiction which is conferred upon them.* Although it is a court of general jurisdiction, yet *in the exercise of these powers its jurisdiction is limited and special*, and whenever its acts are shown to have been in excess of the power conferred upon it, or without the limits of this special jurisdiction, such acts are nugatory, and have no binding effect, even upon those who have invoked its authority or submitted to its decision."

That is to say, in plain terms, that the superior court while exercising its jurisdiction in "probate matters" is a court of special and inferior jurisdiction.

In the later case, In re Burton, 93 Cal. 459, 463; 29 Pac. Rep. 36, the same court used this language:

"The superior court, *while sitting in matters of probate, is the same as it is while sitting in cases in equity, in cases at law, or in special proceedings;* and when it has jurisdiction of the subject-matter of a case falling within either of these classes, it has power to hear and determine, in the mode provided by law, all questions of law and fact the determination of which is ancillary to a proper judgment in such case."

That is to say, that a superior court, while sitting in matters of probate, is a court of superior and general jurisdiction. The later case no doubt states the correct rule on the subject, but it is a little remarkable that the case of Smith *v.* Westerfield, which states a directly opposite rule, should have been the only case cited by the court to support it. See also Pennie *v.* Roach, 94 Cal. 515, 521; 29 Pac. Rep. 956; 30 Pac. Rep. 106.

[1] Masters *v.* Brinker, 87 Ky. 1; 7 S. W. Rep. 158.

[2] Donlin *v.* Hettinger, 57 Ill. 348; Smith *v.* Westerfield, 88 Cal. 374; 26 Pac. Rep. 206.

[3] *Post*, sec. 84; Rottman *v.* Schmucker, 94 Mo. 139; 7 S. W. Rep. 117.

It must not be overlooked that many of the cases turn upon the language of constitutional or statutory provisions fixing the standard of such courts.[1] It is generally held that such courts may exercise such powers only as are expressly granted to them by the statute and such powers as are necessarily incidental thereto.[2]

Some of the cases go still further and hold that they take no incidental powers or constructive authority, by implication, or which is not expressly given by statute.[3] But an act giving such incidental jurisdiction as may be necessary or proper in the final settlement of an estate can not be held unconstitutional, although such jurisdiction could not be conferred upon such court independently of such administration and the settlement thereof.[4]

The authority to grant letters of administration is sometimes given to the clerk of the court, who may issue such letters in vacation. But his acts in granting such letters are ministerial and not judicial, and are not entitled to the presumptions accorded to judicial proceedings.[5] But where letters are granted by a court having jurisdiction to grant them, it will be conclusively presumed that the facts authorizing the granting of such letters, in the particular case, actually existed. The letters themselves are conclusive evidence of the fact that they were properly issued, as against a collateral attack.[6] In some cases the letters are held to be *prima facie* evidence.[7]

In some of the states there are direct statutory pro-

[1] Succession of Bellande, 41 La. Ann. 491; 6 Sou. Rep. 505.

[2] Riggs *v.* Cragg, 89 N. Y. 479; Clements' Appeal, 25 N. J. Eq. 508.

[3] In re Hawley, 104 N. Y. 250; 10 N. E. Rep. 352.

[4] In re McPherson, 104 N. Y. 306; 10 N. E. Rep. 685.

[5] Illinois Cent. R. Co. *v.* Cragin, 71 Ill. 177.

[6] Kelly *v.* West, 80 N. Y. 139; Leonard *v.* Columbia S. & Nav. Co., 84 N. Y. 48; 38 Am. Rep. 491; O'Connor *v.* Huggins, 113 N. Y. 511, 517; 21 N. E. Rep. 184; Bolton *v.* Schriever, 135 N. Y. 65; 31 N. E. Rep. 1001; Street *v.* Augusta Ins. Co., 75 Am. Dec. 722, note; Abbott *v.* Coburn, 28 Vt. 663; 67 Am. Dec. 735.

[7] Renuck *v.* Butterfield, 31 N. H. 70; 64 Am. Dec. 316.

visions to the effect that the grant of letters shall be conclusive.[1]

But such statutes simply declare a rule of law, affecting the jurisdiction of such courts which is established by the weight of authority without the aid of any statute.[2]

The doctrine that the decrees or orders of a probate court are conclusive as against a collateral attack extends to other proceedings as well as to the granting of letters. But such proceedings are not conclusive when obtained by fraud, and may be set aside.[4] And in some of the cases the conclusive effect of the proceedings of such courts is confined to final decrees or orders.[5] And this must necessarily be so as to many of the proceedings of such a court. Therefore the court itself may in a final accounting correct any mistake made in the settlement of partial accounts made by an administrator, executor, or guardian.[6]

But a decree settling a final account and discharging an executor or administrator is conclusive, until reversed, in the absence of fraud.[7]

And a grant of letters can not be avoided collaterally

[1] Power *v.* Speckman, 126 N. Y. 354; 27 N. E. Rep. 474; Bolton *v.* Schriever, 135 N. Y. 65, 69; 31 N. E. Rep. 1001.

[2] Bolton *v.* Schriever, 135 N. Y. 65, 69; 31 N. E. Rep. 1001; McFarland *v.* Stone, 17 Vt. 165; 44 Am. Dec. 325.

[3] In re Couts, 87 Cal. 480; 25 Pac. Rep. 685; Lataillade *v.* Orena, 91 Cal. 565, 576; 27 Pac. Rep. 924; Shoemaker *v.* Brown, 10 Kan. 383; Singerly *v.* Swain, 33 Penn. St. 102; 75 Am. Dec. 581; Schultz *v.* Schultz, 10 Grattan, 358; 60 Am. Dec. 335, 353, note; Freeman on Judg., 3d ed., secs. 319a, 608; Green *v.* Creighton, 10 S. & M. (Miss.) 159; 48 Am. Dec. 742.

[4] Lataillade *v.* Orena, 91 Cal. 565, 576; 27 Pac. Rep. 924; Griffith *v.* Godey, 113 U. S. 89; 5 Sup. Ct. Rep. 383; Shoemaker *v.* Brown, 10 Kan. 383.

[5] Mix's Appeal, 35 Conn. 121; 95 Am. Dec. 222.

[6] Mix's Appeal, 35 Conn. 121; 95 Am. Dec. 222; Lucich *v.* Medin, 3 Nev. 93; 93 Am. Dec. 376; Wiggin *v.* Swett, 6 Met. 194; 39 Am. Dec. 716, 724, note.

[7] Stubblefield *v.* McRaven, 5 S. & M. (Miss.) 130; 43 Am. Dec. 502, 506, note; Wiggin *v.* Swett, 6 Met. 194; 39 Am. Dec. 716, 724, note.

on the ground that the person to whom the grant was made was not competent to qualify.[1]

As jurisdiction is sometimes given of "all probate matters" without defining such jurisdiction, the question has been presented in some cases as to what is included in the term probate matters.[2]

A court of probate has been defined as "a court exercising jurisdiction over the estates of deceased persons, possessing, as to personal assets, nearly all the powers formerly exercised by the courts of chancery and the ecclesiastical courts of England."[3]

[1] Palmer *v.* Oakley, 2 Doug. 433; 47 Am. Dec. 41.

[2] Winch *v.* Tobin, 107 Ill. 212.

[3] Anderson, Dic. of Law, 815; Board of Public Works *v.* Columbia College, 17 Wall. 521; Houston *v.* Killough, 80 Tex. 296; 16 S. W. Rep. 56.

"Of the probate courts it is only said that a part of the judicial power of the territory shall be vested in them. What part? The answer to this must be sought in the general nature and jurisdiction of such courts as they are known in the history of the English law and in the jurisprudence of this country. It is a tempting subject to trace the history of the probate of wills and the administration of the personal estates of decedents, from the time it was held to be a matter of exclusive ecclesiastical prerogative, down to the present. It is sufficient to say that through it all, to the present hour, it has been the almost uniform rule among the people, who make the common law of England the basis of their judicial system, to have a distinct tribunal for the establishment of wills and the administration of the estates of men dying either with or without wills. These tribunals have been variously called prerogative courts, probate courts, surrogates, orphans' courts, etc. To the functions more directly appertaining to wills and the administration of estates, have occasionally been added the guardianship of infants and control of their property, the allotment of dower, and perhaps other powers related more or less to the same general subject. Such courts are not in their mode of proceeding governed by the rules of the common law. They are without juries, and have no special system of pleading. They may or may not have clerks, sheriffs, or other analogous officers. They were not in England considered originally as courts of record; and have never, in either that country or this, been made courts of general jurisdiction, unless the attempt to do so in this case be successful." Perris *v.* Higley, 20 Wall. 375.

"The proceeding provided by section 1664 of the Code of Civil Procedure is a special proceeding (Smith *v.* Westerfield, 88 Cal. 374), and is embraced within the scope of 'matters of probate,' as clearly so as is

And it is said that "such courts collect the assets, allow claims, direct payments and distributions of the property to legatees or others entitled, and generally, do every thing essential to a final settlement of the affairs of the deceased, and the claims of creditors against the estate.[1]" But this does not extend to controversies between the estate and third parties not claiming under such estate or as

the proceeding for the sale of real property to pay debts of an estate. The objects of probate proceedings are to administer, settle, and distribute the estates of deceased persons. They are commenced by petition for letters of administration, or for the probate of wills, and they are closed by a decree distributing 'the residue of the estate in the hands of the executor or administrator, if any, among the persons *who by law are entitled thereto*' (Code Civ. Proc., sec. 1665), and an order discharging the executor or administrator, but who can not be discharged from his trust until he has 'delivered up, under the order of the court (order of distribution), all the property of the estate *to the parties entitled*.' (Sec. 1697.) It will not be denied that the decree of distribution, and the order discharging the executor or administrator are within the scope of 'matters of probate,' in the sense of the constitution, from which it necessarily follows that the court must have the incidental power, in some mode, to ascertain and determine who are entitled, as distributees, to the residue of the estate, even though such determination should involve a question as to title or possession of real property; and I see no objection, on constitutional grounds, to the mode provided by section 1664 of the Code of Civil Procedure. The superior court, while sitting in matters of probate, is the same as it is while sitting in cases in equity, in cases at law, or in special proceedings; and when it has jurisdiction of the subject-matter of a case falling within either of these classes, it has power to hear and determine, in the mode provided by law, all questions of law and fact the determination of which is ancillary to a proper judgment in such case. This is an incidental power pertaining 'to all courts, for the purpose of enabling them to exercise the jurisdiction which is conferred upon them.' (Smith *v.* Westerfield, 88 Cal. 374.)" In re Burton, 93 Cal. 459, 463; 29 Pac. Rep. 36.

As to what such a grant of jurisdiction includes, see further: Houston *v.* Killough, 80 Tex. 296; 16 S. W. Rep. 56; Aspley *v.* Murphy, 50 Fed. Rep. 376; Simmons *v.* Saul, 138 U. S. 439; 11 Sup. Ct. Rep. 369; Detroit, L. & N. R. Co. *v.* Probate Judge, 63 Mich. 676; 30 N. W. Rep. 598 People *v.* Loomis, 96 Ill. 377; Brook *v.* Chappel, 34 Wis. 405; Tryon *v.* Farnsworth, 30 Wis. 577; Townsend *v.* Townsend, 4 Cold. (Tenn.) 70; 94 Am. Dec. 184.

[1] Board of Public Works *v.* Columbia College, 17 Wall. 521; Brook *v.* Chappel, 34 Wis. 405.

creditors of it;[1] or to cases where the question whether the party is a creditor or not, depends upon the determination of some matter not within the jurisdiction of the probate court.[2] Questions of title to real estate, for example, arising, not under a claim to receive it in the distribution of the estate, but adversely to such estate, do not fall within the jurisdiction of a probate court, nor can it determine the rights of strangers to property in the course of administration.[3] But when it becomes necessary to pass upon a question of title in order to ascertain and determine who are entitled as distributees of the estate, a probate court has jurisdiction to pass upon the question.[4] So where the determination of the question of title is necessary for other purposes in the administration of the estate;[5] and a probate court having power to determine who are the proper distributees of an estate has power to inquire into the legitimacy of children claiming to be entitled to distribution;[6] and to determine every disputed question of fact necessary to ascertain the amount due to each distributee;[7] and may, for the purposes of distribution, construe a will.[8] Such jurisdiction extends to the distribution of the estate, or a part of it, to persons claiming under the heirs, as this is a part of the settlement of

[1] Hewitt's Appeal, 53 Conn. 24; 1 Atl. Rep. 815; Mobley *v.* Andrews, 55 Ark. 222; 17 S. W. Rep. 805; Cox *v.* Cox, 77 Tex. 587; 14 S. W. Rep. 201; Hickman *v.* Stone, 69 Tex. 255; 5 S. W. Rep. 833.

[2] In re Miller's Estate, 136 Pa. St. 349; 20 Atl. Rep. 565.

[3] Hickman *v.* Stone, 69 Tex. 255; 5 S. W. Rep. 833; Stewart *v.* Lohr, 1 Wash. St. 341; 25 Pac. Rep. 457; In re Haas, 97 Cal. 232; 32 Pac. Rep. 327; In re Kimberly, 97 Cal. 281; 32 Pac. Rep. 234; Hewitt's Appeal, 53 Conn. 24; 1 Atl. Rep. 815.

[4] In re Burton, 93 Cal. 459; 29 Pac. Rep. 36; McWillie *v.* Van Vacter, 35 Miss. 428; 72 Am. Dec. 127; Hill *v.* Hardy, 34 Miss. 289.

[5] Succession of Bellande, 41 La. Ann. 491; 6 Sou. Rep. 505; Shaw's Estate, 81 Me. 207; 16 Atl. Rep. 662; McWillie *v.* Van Vacter, 35 Miss. 428; 72 Am. Dec. 127.

[6] In re Laramie, 6 N. Y. Sup. 175; Riggs *v.* Cragg, 89 N. Y. 479; In re Jessup, 81 Cal. 408; 21 Pac. Rep. 976.

[7] McLaughlin *v.* McLaughlin, 4 Ohio St. 508; 64 Am. Dec. 603.

[8] Riggs *v.* Cragg, 89 N. Y. 479; In re Verplanck, 91 N. Y. 439; Purdy *v.* Hayt, 92 N. Y. 446.

the estate.[1] And the court has jurisdiction to determine whether such assignment was made or not as between the claimant and the heir.[2]

Formerly, in England, probate courts had cognizance only of wills pertaining to personal property, such as pertained, originally, to the ecclesiastical courts under the civil law. But, generally, statutes conferring jurisdiction in this country make no distinction between wills affecting personal property and those relating to real estate.[3] The general rule is that probate jurisdiction extends only to the probate of wills and not to questions involving their validity or the rights of parties under them, unless such jurisdiction is expressly given by statute.[4] But this is subject to legislative control, unless restrained by some constitutional provision, and in most of the states the powers of such courts are made to cover the construction of a will when necessary in the settlement of the estate.[5] Usually the management and settlement of the estates of infants, of persons of unsound mind, and other incompetents, are committed to probate courts, or such as have probate jurisdiction.[6] And in some of the states this jurisdiction is made exclusive in such courts;[7] but it is not, strictly speaking, probate business, although it has been classed as such, in some cases, by statute.[8]

This is a jurisdiction that formerly belonged to the chancery courts.[9] And it is held that the jurisdiction in

[1] Hewitt's Appeal, 53 Conn. 24; 1 Atl. Rep. 815; McLaughlin *v.* McLaughlin, 4 Ohio St. 508; 64 Am. Dec. 603.

[2] McCabe's Estate, 18 N. Y. Supl. 715.

[3] Ellis *v.* Davis, 109 U. S. 485; 3 Sup. Ct. Rep. 327.

[4] Hanscom *v.* Marston, 82 Me. 288; 19 Atl. Rep. 460.

[5] Glover *v.* Reid, 80 Mich. 228; 45 N. W. Rep. 91.

[6] Perris *v.* Higley, 20 Wall. 375; Wing *v.* Dodge, 80 Ill. 564; Wilson *v.* Roach, 4 Cal. 362; Gorman *v.* Taylor, 43 Ohio St. 86; 1 N. E. Rep. 227; Shroyer *v.* Richmond, 16 Ohio St. 455; Reed *v.* Ring, 93 Cal. 96; 28 Pac. Rep. 851.

[7] Gorman *v.* Taylor, 43 Ohio St. 86; 1 N. E. Rep. 227; Shroyer *v.* Richmond, 16 Ohio St. 455.

[8] Winch *v.* Tobin, 107 Ill. 212.

[9] Brown *v.* Snell, 57 N. Y. 286; Davis *v.* Spencer, 24 N. Y. 386.

the probate court is controlled by the general rules of equity jurisprudence relating thereto.[1]

A distinction is made between guardians appointed by the court and testamentary guardians with respect to the jurisdiction of the court over them. And it is held that the court can exercise no jurisdiction over the latter except such as is expressly conferred upon it by statute.[2] But jurisdiction over testamentary guardians is generally given by statute.[3] And in the absence of statutory provisions conferring jurisdiction, courts of chancery have control of such guardianships.[4]

The existence of a testamentary guardian does not deprive the court of power to appoint a statutory guardian where such testamentary guardian has not taken upon himself the trust or entered upon the performance of its duties. It is otherwise where such guardian has entered upon the management of the guardianship under the direction of the probate court.[5] Nor does the fact that a guardian has been appointed in another state deprive the court of such jurisdiction.[6]

Jurisdiction of the settlement of estates was also in courts of chancery.[7] This jurisdiction grew up mainly out of the inadequacy of the ecclesiastical court to afford the proper relief, and resulted, in part, from the general jurisdiction of the equity courts in matters of trusts and accounting. And the jurisdiction is still maintained in such courts, or courts having

[1] Brown *v.* Snell, 57 N. Y. 286.

[2] Matter of Hawley, 104 N. Y. 250, 263; 10 N. E. Rep. 352.

[3] Matter of Hawley, 104 N. Y. 250, 263; 10 N. E. Rep. 352; Fridge *v.* State, 3 Gill & J. 103; 20 Am. Dec. 463; Matter of Van Houten, 2 Green Ch. 220; 29 Am. Dec. 707, 712, note.

[4] Matter of Van Houten, 2 Green Ch. 220; 29 Am. Dec. 707, 715, note; Lord *v.* Hough, 37 Cal. 657, 663.

[5] Fridge *v.* State, 3 Gill & J. 103; 20 Am. Dec. 463.

[6] Kraft *v.* Wickey, 4 Gill & J. 332; 23 Am. Dec. 569.

[7] Board of Public Works *v.* Columbia College, 17 Wall. 521; Deck *v.* Gerke, 12 Cal. 433; 73 Am. Dec. 555; Russell *v.* Madden, 95 Ill. 485; Clarke *v.* Perry, 5 Cal. 58; 63 Am. Dec. 82, 84, note; Konigmacher *v.* Kimmel, 1 Pen. & Watts, 207; 21 Am. Dec. 374.

equity jurisdiction, in some of the states, unless it is made exclusive in the probate court.[1]

In such cases the jurisdiction is concurrent,[2] and where a court of chancery takes jurisdiction of the administration for any purpose, it may retain the same for all purposes to the exclusion of the probate court.[3] And when proceedings for settlement of the estate have been commenced in the probate court, its jurisdiction thus acquired will be exclusive of the concurrent jurisdiction of a court of chancery, unless some special equitable ground for the interference of the latter is assigned.[4] But it is generally held that, although the jurisdiction is equitable in its nature and belongs of right to the chancery courts, it will not be exercised where the general power over the administration of estates is given to some other court, by express statutory provision, except in peculiar and extraordinary cases.[5] And that where the court takes jurisdiction for a particular purpose, it will not, after settling such question, take upon itself the entire settlement of the estate, except for special reasons.[6]

The jurisdiction of a court of chancery over the administration of estates and the settlement of the accounts of executors and administrators, where a probate court is provided, is expressly denied in some cases.[7] And, as we

[1] Tygh *v.* Dolan, 10 Sou. Rep. 837; Deck *v.* Gerke, 12 Cal. 433; 73 Am. Dec. 555; Wilson *v.* Roach, 4 Cal. 362; Pennie *v.* Roach, 94 Cal. 515; 29 Pac. Rep. 956; 30 Pac. Rep. 106; Salter *v.* Williamson, 1 Green Ch. 480; 35 Am. Dec. 513.

[2] Robinson *v.* Stanley, 38 Vt. 570; Brook *v.* Chappel, 34 Wis. 405; Tryon *v.* Farnsworth, 30 Wis. 577; Shoemaker *v.* Brown, 10 Kan. 383.

[3] Tygh *v.* Dolan, 10 Sou. Rep. 837.

[4] Espalla *v.* Dolan, 8 Sou. Rep. 491; Green *v.* Creighton, 10 S. & M. (Miss.) 159; 48 Am. Dec. 742, 744, note.

[5] Board of Public Works *v.* Columbia College, 17 Wall. 521; Espalla *v.* Dolan, 8 Sou. Rep. 491; Harding *v.* Shepard, 107 Ill. 264; Crain *v.* Kennedy, 85 Ill. 340; Gorman *v.* Taylor, 43 Ohio St. 86; 1 N. E. Rep. 227.

[6] Cowdrey *v.* Hitchcock, 103 Ill. 262, 276.

[7] Green *v.* Creighton, 10 S. & M. (Miss.) 159; 48 Am. Dec. 742; Morningstar *v.* Selby, 15 Ohio, 345; 45 Am. Dec. 579; Matter of Sinclair, 5 Ohio St. 291.

have seen above, the jurisdiction of the probate court is in many of the states made exclusive by statutory provisions.

In other cases, it is held that there are certain matters connected with the administration of estates so essentially a part of the general jurisdiction of courts exercising chancery powers that where common law and equity jurisdiction is conferred upon certain other courts by the constitution of the state, a statute conferring exclusive jurisdiction of the settlement of estates upon probate courts is unconstitutional, for the reason that it takes away some of the equitable jurisdiction of such courts.[1] And it is held that a court of chancery may interpose where the probate court is wholly incompetent to give relief and the party is entitled to it.[2]

Some of the cases take the broad ground that the legislature has no power to confer upon probate courts common-law or equity jurisdiction.[3] But the weight of au-

[1] Perris *v.* Higley, 20 Wall. 375; Garcia y Perea *v.* Barela, 23 Pac. Rep. 766; Detroit L. & N. R. Co. *v.* Probate Judge, 63 Mich. 676; 30 N. W. Rep. 598.

[2] Wade *v.* American Col. So., 7 S. & M. (Miss.) 663; 45 Am. Dec. 324.

[3] "The probate court is a court which, although declared a court of record, and having large and important powers, is nevertheless an inferior court, subject to the review of the circuit courts, and not designed or adapted to the exercise of the ordinary judicial power, in dealing with litigated questions affecting persons not subject to the exercise of prerogative jurisdiction, and entirely *sui juris*. The jurisdiction over contentious litigation belongs, under the constitution, to courts of law and equity. In order to make such authority efficient as is exercised by respondent in this case, it is absolutely necessary, and the statute so provides, to restrain the parties whose land is taken from suing in other courts. Such suits must be brought usually in the circuit courts, and may be taken, by appellate action, to this court. It is out of the question that an inferior court can stay proceedings in those courts to which the law has made it subordinate. In the present case, to make this probate order effective, that court must be able to lay its hands on the proceedings now pending in this court, or, previous to the appeal here, to stay action in the Livingston circuit court, or in any other court in the state where parties might litigate the trespass committed by the petitioning railroad company. Such a proposition can not be maintained. No such jurisdiction can be conferred on a probate court. It is foreign to the constitution of such courts, and subversive of the constitutional distribution of judicial powers. The nature of probate courts was dis-

thority is undoubtedly against this view, the right having been exercised by the legislatures and recognized by the courts in many if not the most of the states.[1]

It is usually held, however, that the power to construe a will at the instance of the executors, particularly where such will creates a special trust in such executors as to lands of the testator, is peculiarly within the jurisdiction of a court of chancery, and will be exercised by it notwithstanding the existence, within the same jurisdiction, of a court of probate.[2] And in some of the states the

cussed in Ferris *v.* Higley, 20 Wall. 375, where it was held beyond the power of the legislature of Utah to give them common-law and equity jurisdiction. They have existed in Michigan since its complete territorial organization, and their character has never been doubtful. They have always been regarded as courts for peculiar and limited purposes, which are outside of ordinary litigation, and incapable of dealing completely with ordinary rights." Detroit, L. & N. R. Co. *v.* Probate Judge, 63 Mich. 676; 30 N. W. Rep. 598, 600.

[1] Wernse *v.* Hall, 101 Ill. 423.

[2] Whitman *v.* Fisher, 74 Ill. 147; Woodfin *v.* Phoebus, 30 Fed. Rep. 289; Bridges *v.* Rice, 99 Ill. 414.

"Coming to another question much dwelt upon in the argument, I am very confident that this bill presents no conflict of jurisdiction with the probate court of Elizabeth City county. The demurrant herself recognizes this fact by having filed a bill for a sale in the chancery court of that county. The powers of a probate court are, in Virginia, not greater than those of the ecclesiastical courts of England, which, with respect to the administration of trusts created by wills, are proverbially courts of 'a lame jurisdiction.' When the jurisdiction of a court of chancery is invoked by or against an executor, to direct the administration of a will, its power to do so has been held to exist from the beginning of chancery jurisprudence in England, and not in any manner or degree to interfere with that of a probate court, exercising its legitimate jurisdiction as such. Mr. Pomeroy says that the relation subsisting between executors and administrators, on the one hand, and legatees, distributees, and creditors, on the other, has so many of the features and incidents of an express, active trust that it has been completely embraced within the equitable jurisdiction in England, and also in the United States, where the statutes of states have not interferred to take away or abridge the jurisdiction. (Section 156.) He gives a full discussion to the character of the several and varying state statutes (sections 346-352), and, in view of all their provisions, declares that, 'although the general jurisdiction of equity over the subject of administration is practically, and even, in the instances of some states, expressly, abolished, still the jurisdiction remains in all matters of trusts created

jurisdiction extends, by virtue of statutory provisions, to all trusts arising under wills.[1] And it is sometimes held that a probate court has no power to construe a will.[2]

A court of equity has no original jurisdiction to order the sale of real estate to pay debts, or for any other purpose, so as to bind the infant's legal estate.[3] Nor will a court of chancery entertain jurisdiction where there is no personal estate, and no trust, but merely a claim to a legal estate in lands.[4]

In some of the cases, it is held that the probate court is a court of equity to the extent that it has the power to administer equity in matters properly before it.[5] But this is not full equity jurisdiction, but such only as is adapted to its organization and modes of proceeding.[6]

In some of the states, such courts are given very broad

by or arising from the provisions of wills; and that thus a large field is left for the exercise of the equitable jurisdiction in the construction of wills, and in the determination and enforcement of equitable rights, interests, and estates created and conferred thereby.'

"It can not be pretended, however the case may be in other states, that general chancery powers over the administration of the estates of decedents have in Virginia been taken away from courts of equity, as such, and transferred to courts of probate. And even if the general jurisdiction had been taken away here, still it is laid down by Mr. Pomeroy that the peculiar, ancient, and inherent power of chancery over the trust created by wills, which are the most sacred of all trusts, has not in any of the states been taken away.

"There seems, therefore, to be no doubt of the competency of a court of chancery to assume the direction of the trusts of a will, in a case properly brought before it." Woodfin *v.* Phoebus, 30 Fed. Rep. 289, 291.

[1] Hooper *v.* Hooper, 63 Mass. 122, 127.

[2] Mears *v.* Mears, 15 Ohio St. 90.

[3] Whitman *v.* Fisher, 74 Ill. 147, 154; Elliott *v.* Shuler, 50 Fed. Rep. 454; Onderdonk *v.* Mott, 34 Barb. 106; Moffitt *v.* Moffitt, 69 Ill. 641.

[4] Onderdonk *v.* Mott, 34 Barb. 106.

[5] Hewitt's Appeal, 53 Conn. 24; 1 Atl. Rep. 815; Doggett *v.* Dill, 108 Ill. 560; 48 Am. Rep. 565; Brandon *v.* Brown, 106 Ill. 519; Dixon *v.* Buell, 21 Ill. 202; In re Steele, 65 Ill. 322; In re Moore, 96 Cal. 522; 31 Pac. Rep. 584; Lewis *v.* Lewis, 13 Penn. St. 79; 53 Am. Dec. 443; Powell *v.* North, 3 Ind. 392; 56 Am. Dec. 513; McPherson *v.* Cunliff, 11 Serg. & Raw. 422; 14 Am. Dec. 642.

[6] Wadsworth *v.* Connell, 104 Ill. 369, 378.

and ample authority to deal with trusts and matters of accounts growing out of the administration of estates.[1] But there is a clear distinction between matters which can only arise in the settlement of an estate, or guardianship, and questions which do not depend upon the administration of such estate, but may or may not arise therein, and which belong to the general equity jurisdiction of courts of chancery. And it is held that, as to the latter, courts of probate have no jurisdiction, although such jurisdiction may be invoked in the settlement of an estate, unless expressly conferred upon such court by statute.[2] But, as has been said, this is a matter of legislation, subject to constitutional limitations, which have been pointed out above. And as to purely probate matters involving the probate of wills and the ordinary administrative proceedings involved in the administration of estates, a court of chancery has no power, as a part of its general equity jurisdiction, to act. Such jurisdiction belonged, in England, to the ecclesiastical courts, and passes by a general grant of probate jurisdiction.[3] And a grant of common

[1] Phillips *v.* Phillips, 18 Atl. Rep. 579; Robinson *v.* Stanley, 38 Vt. 570; Tryon *v.* Farnsworth, 30 Wis. 577.

[2] Gilliland *v.* Sellers, 2 Ohio St. 223; In re Camp, 126 N. Y. 377; 27 N. E. Rep. 799.

[3] "By the frame of the bill, as well as its prayer, and the decree of the chancellor, it seems to have been apprehended, if the probate of the will in the county court was defective from lapse of time or otherwise, such defects could be cured by the action of the chancery court. This is a mistaken apprehension. At no time has it been held that a court of equity had jurisdiction of the probate of wills. It readily holds administrators and executors to an account of the funds which came into their hands, and gives construction and interpretation to testamentary papers, but never exercises strictly probate jurisdiction.

"In England, that jurisdiction belonged to the ecclesiastical courts; and in an early day in North Carolina, there being no ecclesiastical courts in this country, the probate of wills was given to the county courts; and when this state was erected out of the territory of North Carolina, this jurisdiction, for the same reason, was continued in the county courts, which to this day have the exclusive jurisdiction of wills and testaments: Burrow *v.* Ragland, 6 Humph. 481." Townsend *v.* Townsend, 4 Cold. (Tenn.) 70; 94 Am. Dec. 189; Morningstar *v.* Selby, 15 Ohio, 345; 45 Am. Dec. 579.

law and equity jurisdiction does not include jurisdiction in matters of probate.[1]

The important question as to the extent of chancery jurisdiction in matters growing out of the administration of estates and settlement of guardianships, depends so much upon the constitutional and statutory provisions in the different states, and these provisions differ so materially, that only general principles can be stated in a general work of this kind with references to the decisions in the different states, showing to what extent jurisdictional rules and principles have been established or modified in the different states. To attempt to cite or comment upon the different statutes would carry us beyond the legitimate scope of the work now in hand.[2]

Questions arising in the settlement of estates are peculiarly within the jurisdiction of the probate court, as a general rule, and such court will not deny relief for the reason that the party has an adequate remedy at law.[3]

But where the jurisdiction of the court is specifically defined and limited by statute, an exercise of the general jurisdiction of a court of equity, when not authorized by the statute, is *coram non judice and void*.[4] This results, necessarily, from the doctrine that the court is one of limited jurisdiction.

In some of the states probate courts are almost entirely administrative in their character, and have no jurisdiction to determine controverted questions.[5] But this, as stated

[1] Morningstar *v.* Selby, 15 Ohio, 345; 45 Am. Dec. 579.

[2] A discussion of this question will be found in a note to Deck *v.* Gerke, 73 Am. Dec. 558, in which will be found a statement taken from 3 Pomeroy's Eq. Jur., sec. 1154, classifying the legislation on the subject by states.

See, also, note to Green *v.* Creighton, 48 Am. Dec. 744.

[3] Brook *v.* Chappel, 34 Wis. 405.

[4] Gilliland *v.* Sellers, 2 Ohio St. 223; Hanscom *v.* Marston, 82 Me. 288; 19 Atl. Rep. 460.

[5] Hanscom *v.* Marston, 82 Me. 288; 19 Atl. Rep. 460; Detroit L. & N. R. Co. *v.* Probate Judge, 63 Mich. 676; 30 N. W. Rep. 598.

"Probate courts have no constitutional nor common-law origin. They were created by statute almost solely for administrative purposes, and

above, is not generally the case. The tendency and effect of legislation has been to extend and broaden the jurisdiction of such courts in order that they may have power to decide every question necessary to the entire and final settlement of an estate.[1]

The general equity jurisdiction of the federal courts, in the administration of estates, can not be taken away or limited by state laws.[2] Therefore the fact that all chancery jurisdiction over the administration of estates has, by state laws, been vested in a probate court, does not affect the jurisdiction of the federal courts, although it may deprive the chancery courts of the state of all such jurisdiction.[2] Nor does the fact that property is being administered upon in a state court having jurisdiction, and that a party might apply to such court for relief, bar the institution of proceedings, with reference to such property, in

what little 'contentious jurisdiction' they may possess is only incidental to their administrative jurisdiction. They have no administrative powers, even, beyond those conferred by statute. So true is this that, in the absence of a statute authorizing it, a probate court can not empower an administrator to sell land for payment of debts. Without the statute, he would need resort to a court of chancery powers. The probate court has the power, upon proper proceedings, to make a decree of distribution, and, if there be no will, to determine who are the heirs, and the share of each (Loring *v.* Steineman, 1 Metc. 204; Rev. Stat., c. 65, sec. 27); but it has no power in this state to construe a will—to determine its effect upon the distribution of the estate—or to adjudicate between the heirs and the residuary legatees. Such power is given to probate courts in some states, but in our system it is reserved to the law and equity courts. Where there is a will, as in this case, the probate court may determine when the estate is fully settled, and may then order the executor to distribute the balance according to the will, so far as the will directs, otherwise according to law, but there its power ends. What the will does direct, or whether it directs at all, are questions for another tribunal. The executor, like other officers, must learn the law, and, unlike many other officers, he can obtain from the equity court an authoritative construction of the will, and authoritative directions how to perform the duties of his trust, so far as legacies are concerned." Hanscom *v.* Marston, 82 Me. 288; 19 Atl. Rep. 460.

[1] McWillie *v.* Van Vacter, 35 Miss. 428; 72 Am. Dec. 127; Linsenbigler *v.* Gourley, 56 Pa. St. 166; 94 Am. Dec. 51.

[2] Payne *v.* Hook, 7 Wall. 425.

the federal courts.[1] Nor can the right to sue an administrator or executor in a federal court be taken away by a state statute.[2]

The jurisdiction of the federal courts does not extend to the probate of wills or empower them to set aside and annul the probate of a will of personal or real estate. They can only inquire into the validity of a will in a case at law or in equity where it becomes necessary to settle a controversy of which they may take cognizance by reason of the citizenship of the parties.[3]

But the federal courts have jurisdiction to entertain a suit to annul a will, as a muniment of title, between citizens of different states, where such a suit could be maintained in any of the courts of the state. It is in all essential respects a suit for equitable relief.[4]

[1] Griswold *v.* Central Vermont R. Co., 9 Fed. Rep. 797; Erwin *v.* Lowry, 7 How. 172.

[2] Suydam *v.* Broadnax, 14 Pet. 67.

[3] Ellis *v.* Davis, 109 U. S. 485; 3 Sup. Ct. Rep. 327.

"The judicial power of the United States extends, by the terms of the constitution, 'to controversies between citizens of different states;' and on the supposition, which is not admitted, that this embraces only such as arise in cases 'in law and equity,' it does not necessarily exclude those which may involve the exercise of jurisdiction in reference to the proof and validity of wills. The original probate, of course, is mere matter of state regulation, and depends entirely upon the local law; for it is that law which confers the power of making wills, and prescribes the conditions upon which alone they may take effect; and as, by the law in all the states, no instrument can be effective as a will until proved, no rights in relation to it, capable of being contested between parties, can arise until preliminary probate has been first made. Jurisdiction as to wills, and their probate as such, is neither included in nor excepted out of the grant of judicial power to the courts of the United States. So far as it is *ex parte* and merely administrative, it is not conferred, and it can not be exercised by them at all until, in a case at law or in equity, its exercise becomes necessary to settle a controversy of which a court of the United States may take cognizance by reason of the citizenship of the parties." Ellis *v.* Davis, 109 U. S. 485; 3 Sup. Ct. Rep. 327, 334.

[4] "But the admission supposed is not required in this case. The suit in the parish court is not a proceeding to establish a will, but to annul it as a muniment of title, and to limit the operation of the decree admitting it to probate. It is, in all essential particulars, a suit for equitable relief—to cancel an instrument alleged to be void, and to restrain the

The jurisdiction of a court of probate depends upon the death of the owner of the estate sought to be administered, without which it has no power to act, and its proceedings are wholly void;[1] and generally upon the domicile of the deceased being within the territorial jurisdiction of the court at the time of his death,[2] or the presence of property of such deceased therein.[3] But whether the property must have been within the jurisdiction of the court at the time of the death or whether the bringing of such property therein, subsequently, is sufficient, is not well settled.

This may, of course, turn upon the language of the particular statute under which the proceedings are had, and,

enforcement of a decree alleged to have been obtained upon false and insufficient testimony. There are no separate equity courts in Louisiana, and suits for special relief of the nature here sought are not there designated suits in equity. But they are none the less essentially such suits; and if by the law obtaining in the state, customary or statutory, they can be maintained in the state court, whatever designation that court may bear, we think they may be maintained by original process in a federal court, where the parties are, on the one side, citizens of Louisiana, and, on the other, citizens of other states." Gaines v. Fuentes, 92 U. S. 10, 20.

[1] Griffith *v.* Frazier, 8 Cranch, 9, 23; Mellia *v.* Simmons, 45 Wis. 334; 30 Am. Rep. 746; D'Arusment *v.* Jones, 4 Lea, 251; 40 Am. Rep. 12; Roderigas *v.* East River Sav. Inst., 76 N. Y. 316; 32 Am. Rep. 309; Allen *v.* Dundas, 3 T. R. 125; Freeman on Judg. (3 ed.), sec. 319*a*; Thomas *v.* People, 107 Ill. 517; 47 Am. Rep. 458; Haynes *v.* Meeks, 10 Cal. 110; 70 Am. Dec. 703; Fisher *v.* Bassett, 33 Am. Dec. 239, note: Ex parte Maxwell, 79 Am. Dec. 65, note; Moore *v.* Smith, 11 Rich. Law, 569; 73 Am. Dec. 122, 126, note; Andrews *v.* Avory, 14 Grattan, 229; 73 Am. Dec. 355; Scott *v.* McNeal, 154 U. S. 34; 14 Sup. Ct. Rep. 1108.

A contrary rule is declared in Roderigas *v.* East River Savings Bank, 63 N. Y. 460; 20 Am. Rep. 555; but this case seems to stand alone.

[2] Shaw's Estate, 81 Me. 207; 16 Atl. Rep. 662; Illinois Cent. R. Co. *v.* Cragin, 71 Ill. 177; Jeffersonville R. Co. *v.* Swayne, 26 Ind. 477; Broughton *v.* Bradley, 34 Ala. 694; 73 Am. Dec. 474; Estate of Harlan, 24 Cal. 182; 85 Am. Dec. 58; Ex parte Maxwell, 79 Am. Dec. 62, 65, note; Johnson *v.* Corpenning, 4 Ire. Eq. 216; 44 Am. Dec. 106.

[3] Territory *v.* Klee, 1 Wash. St. 183; 23 Pac. Rep. 417; Illinois Cent. R. Co. *v.* Cragin, 71 Ill. 177; Shaw's Estate, 81 Me. 207; 16 Atl. Rep. 662; Jeffersonville R. Co. *v.* Swayne, 26 Ind. 477; Broughton *v.* Bradley, 73 Am. Dec. 474, 484, note; Beckett *v.* Selover, 7 Cal. 215; 68 Am. Dec. 237, 257, note.

usually, property coming into a county subsequent to the death, gives jurisdiction.[1] But not always.[2] Sometimes where one dies out of the state, leaving property in different counties therein, exclusive jurisdiction is given to the court first assuming such jurisdiction. Under such a statute any proceeding commenced in the court of one county after the granting of letters by the court of another county, is void.[3] A mere local statutory cause of action for damages for injury is not property within the meaning of such statutes which will give the court jurisdiction.[4] There is a material distinction between these different elements, or foundations, of jurisdiction. As to the first: the death of the party whose estate is affected; no finding of the court of the fact of the death can give the court jurisdiction, because, as above stated, if the supposed testate or intestate is not in fact dead, there is a total want of jurisdiction, and the proceeding is absolutely void. There is no subject-matter upon which the court is given jurisdiction to act. As to the last two, viz: the place of domicile, or the presence of property of the deceased within the jurisdiction of the court, they are questions of fact upon which the court has jurisdiction to find. And if found to exist, such finding is conclusive as against a collateral attack.[5] It must be remembered, however, that it

[1] Thomas *v.* Wood, 61 Ind. 132; Illinois Cent. R. Co. *v.* Cragin, 71 Ill. 177; Jeffersonville R. Co. *v.* Swayne, 26 Ind. 477; Fletcher *v.* Sanders, 7 Dana, 345; 32 Am. Dec. 96.

[2] Burnett *v.* Meadows, 7 B. Mon. 277; 46 Am. Dec. 517; Embry *v.* Millar, 1 A. K. Mar. 300; 10 Am. Dec. 732.

[3] Territory *v.* Klee, 1 Wash. St. 183; 23 Pac. Rep. 417.

[4] Illinois Cent. R. Co. *v.* Cragin, 71 Ill. 177; Jeffersonville R. Co. *v.* Swayne, 26 Ind. 477.

As to what is properly within the meaning of such statutes, and sufficient to give jurisdiction, see, also, Shaw's Estate, 81 Me. 207; 16 Atl. Rep. 662; Jeffersonville R. Co. *v.* Swayne, 26 Ind. 477.

[5] *Ante*, secs. 23, 25; Bostwick *v.* Skinner, 80 Ill. 147; Monell *v.* Dennison, 17 How. Pr. 422; Irwin *v.* Scriber, 18 Cal. 499; Bolton *v.* Schriever, 135 N. Y. 65, 69, 72; 31 N. E. Rep. 1001; Giddings *v.* Steele, 28 Tex. 733; 91 Am. Dec. 336; Coltart *v.* Allen, 40 Ala. 155; 88 Am. Dec. 757; Fisher *v.* Bassett, 9 Leigh, 119; 33 Am. Dec. 227, 239, note; Andrews *v.* Avory, 14 Grattan, 229; 73 Am. Dec. 355.

is held otherwise in some of the states, as shown above in this section. Where the statutory foundation of jurisdiction to grant letters does not exist, the letters will be revoked on a direct attack by any one interested.[1] It is said in some of the cases that letters granted under such circumstances are *coram non judice* and void. But they are not void, if the court has found the jurisdictional facts to exist, but voidable only as has been shown above.

Letters granted by a judge interested in the estate are void.[2]

The question arises quite frequently whether it is necessary, in a proceeding in probate, that the petition or other pleading calling for the exercise of jurisdiction shall allege all of the facts necessary to give the court jurisdiction to proceed. Of course, where the court is held to be one of special and inferior jurisdiction, this is necessary.[3] And so where, although the court is one of record, and of general jurisdiction, but the particular act to be done is special and statutory, and does not fall within the general powers of the court.[4] It is otherwise where the court is one of general jurisdiction, and the act to be done falls within its general powers and is not special.[5] General principles affecting this subject have received attention in earlier sections of this work,[6] and the subject will be more fully considered, as applicable to proceedings of probate courts, hereafter.[7]

In some of the states statutes have been enacted providing, in effect, that a failure to allege jurisdictional facts shall not be taken advantage of except upon appeal, or other direct attack. Therefore where the court has jurisdiction of the general subject-matter its jurisdiction over the particular proceeding can not be questioned collaterally on the ground that the jurisdictional facts have not

[1] Jefferson R. Co. *v.* Swayne, 26 Ind. 477.
[2] Sigourney *v.* Sibley, 22 Pick. 507; 33 Am. Dec. 762; *ante*, sec. 62.
[3] *Ante*, sec. 23, p. 144; sec. 25, p. 155.
[4] *Ante*, secs. 22, 23, 25.
[5] *Ante*, secs. 20, 22, 23, 25, p. 157.
[6] *Ante*, secs. 11, 22, 23, 25.
[7] *Post*, sec. 76.

been alleged in the petition.[1] Such a statute really places probate courts on the footing of courts of general jurisdiction in all matters, the general subject-matter of which is within their jurisdiction, as respects a collateral attack.[2] And, as to special proceedings, places their judgments and orders above those of superior courts in such proceedings not protected by such a statutory provision, because the judgments and decrees of such courts, in special and statutory proceedings, are subject to collateral attack under such circumstances.[3]

Where a statute authorizes the appointment of persons having certain designated qualifications as executors or administrators, the finding of the fact that an applicant possesses such qualifications is conclusive as against a collateral attack.[4] But it has been held, under a statute authorizing the appointment of a stranger where the relations of the deceased made no claim to administer within a designated time, that letters granted to a stranger, before the expiration of the time limited, are null and void.[5]

The court granting letters of administration does not necessarily acquire exclusive jurisdiction of all matters growing out of the settlement of the estate, as against a court of the same jurisdiction in another county in the state. For example, it is held that proceedings for the sale of real estate may be had in the court of the county in which the land is situate, although letters of administration of the estate were granted in another county and the settlement of the estate is pending there,[6] and that the jurisdiction in such cases is concurrent in the courts of the two counties.[7]

In an action to contest a will, it is held that one or the

[1] Murzynowski *v.* Delaware, L. & W. R. Co., 15 N. Y. Supl. 841; Bearns *v.* Gould, 77 N. Y. 455.

[2] Bearns *v.* Gould, 77 N. Y. 455; Harrison *v.* Clark, 87 N. Y. 572.

[3] *Ante*, sec. 20; *post*, secs. 68, 76.

[4] Caujolle *v.* Curtiss, 13 Wall. 465; Berney *v.* Drexel, 12 Fed. Rep. 393.

[5] Rinehart *v.* Rinehart, 27 N. J. Eq. 475.

[6] *Post*, sec. 76; Williamson *v.* Miles, 25 Ind. 55; Jones *v.* Levi, 72 Ind. 586.

[7] Jones *v.* Levi, 72 Ind. 586.

other of the facts above mentioned, as necessary to give jurisdiction, must be alleged in the complaint.[1] But that proof of the fact will obviate the defect on appeal.[1]

Letters of administration on the same estate may be issued and acted upon in different states at the same time, one by virtue of the domicil of the deceased within the state, and the other founded upon the presence of property within the jurisdiction of the court.[2]

In such cases both letters are valid, each administrator is subject to the jurisdiction and orders of the court appointing him, there is no privity between the two, each must administer so much of the estate as is within the jurisdiction of the court appointing him, and the letters granted where property is situated are generally held to be ancillary to those granted at the place of domicile.[2] But where valid letters of administration upon an estate have been granted the grant of second letters by the same court is void.[3]

Where letters of administration have been issued, such grant can not be attacked in a collateral proceeding on the ground that the alleged intestate left a will.[4]

Independent of some statute to the contrary, letters granted in one state have no force in another state.[5] But statutes authorizing administrators appointed in another

[1] Thomas *v.* Wood, 61 Ind. 132.

[2] McCord v. Thomson, 92 Ind. 565.

[3] Quidort *v.* Pergeaux, 18 N. J. Eq. 472; Mathews *v.* Douthitt, 27 Ala. 273; 62 Am. Dec. 765; Coltart *v.* Allen, 40 Ala. 155; 88 Am. Dec. 757.

"The doctrine of the common law in force in this state is, that when the probate court has granted letters of administration to a person entitled to and capable of discharging the trust, it can not make any new appointment of an administrator of the same estate until the occurrence of one of those events or disabilities which, either temporarily or perpetually, vacates the office—as the death or resignation of the party, the repeal of his authority, etc. If it makes any such new appointment before the occurrence of any one of such events or disabilities, such new appointment is totally void. Griffith *v.* Frazier, 8 Cranch, 9; Justices *v.* Selman, 6 Ga. 432." Mathews *v.* Douthitt, 27 Ala. 273; 62 Am. Dec. 765.

[4] Quidort *v.* Pergeaux, 18 N. J. Eq. 472.

[5] Fletcher *v.* Saunders, 7 Dana, 345; 32 Am. Dec. 96.

state to sue in the states of their enactment are quite common.

The probate of a will is usually held to be conclusive, within the state, as to its validity, as has been shown above. It is in the nature of a proceeding *in rem.* establishes the *status* of the will which, unless avoided in some mode prescribed by law, binds and concludes all the world.[1]

It is sometimes held to be conclusive as to personal property and presumptive as to real estate.[2]

At common law, an *ex parte* probate of a will had no conclusive effect as to land devised, and as to personalty it was revocable by the court that granted it or by some other court of original jurisdiction.[3] It was otherwise where the probate was in solemn form and upon notice.[3]

The probate is no proof of the execution of a will in conformity with the laws of another state.[4] It proves the validity of the will, so far as it affects property within the state, and would be sufficient for that purpose in another state. But a decree that it was executed in conformity to the laws of one state does not prove, or tend to prove, its execution in the manner required by the laws of some other state, no matter where the question arises.[5] Therefore, so far as it is attempted to be used for the purpose of affecting the title to property within any state, it must be probated in such state unless other proof of its due execution is permitted by the laws of the state.[6]

The question as to the conclusiveness of the probate of

[1] Freeman on Judg., 3d ed., secs. 319a, 608; State *v.* McGlynn, 20 Cal. 234; 81 Am. Dec. 118; Schultz *v.* Schultz, 10 Grattan, 358; 60 Am. Dec. 335, 353; Redmond *v.* Collins, 4 Dev. 430; 27 Am. Dec. 208.

[2] Holliday *v.* Ward, 19 Pa. St. 485; 57 Am. Dec. 671.

[3] Sneed *v.* Ewing, 5 J. J. Mar. (Ky.) 460; 22 Am. Dec. 41.

[4] Robertson *v.* Pickrell, 109 U. S. 608; 3 Sup. Ct. Rep. 407; Sneed *v.* Ewing, 5 J. J. Mar. (Ky.) 460; 22 Am. Dec. 41.

[5] Robertson *v.* Pickrell, 109 U. S. 608; 3 Sup. Ct. Rep. 407.

[6] Robertson *v.* Pickrell, 109 U. S. 608; 3 Sup. Ct. Rep. 407; McCormick *v.* Sullivant, 10 Wheat. 192; Street *v.* Augusta, 75 Am. Dec. 722, note.

a will gives rise to the further question, whether the probate court itself has power to vacate its own proceedings for such probate. This depends upon the other question, already considered, whether probate courts are or are not courts of general jurisdiction. If they are, of course they have control over their own decrees, and may vacate them, and may, therefore, revoke the probate of a will. And for this reason it is generally held that they may do so.[1]

The power to revoke is incidental to the power to probate, and may be exercised without express statutory authority.[2] And, for the reason that the power exists in the the probate courts, courts of equity decline to entertain jurisdiction to revoke the probate of wills for fraud or mistake.[3]

But it is held that a statute providing that the judgment of a court of competent jurisdiction may be set aside for fraud, accident, or mistake, confers upon a court of chancery the power to set aside a judgment of a probate court procured by fraud.[4]

The power of a court of chancery to set up a will which has been lost, suppressed, or destroyed, is very strongly maintained in some cases,[5] and denied with equal positiveness by others.[6]

The denial of such jurisdiction rests upon the claim that the power to set up and probate a lost or spoliated will is strictly probate jurisdiction. And this seems to be the correct rule on the subject, and one in harmony with the general principles relating to the power to probate wills. It is difficult to see why the power to probate such

[1] *Post*, sec. 84; Waters *v.* Stickney, 12 Allen, 1; 90 Am. Dec. 122, 136, note; Gaines *v.* Hennen, 24 How. 553.

[2] Waters *v.* Stickney, 12 Allen, 1; 90 Am. Dec. 122, 136, note.

[3] Waters *v.* Stickney, 12 Allen, 1; 90 Am. Dec. 122, 136, note; Freeman on Judg., sec. 608; Gaines *v.* Chew, 2 How. 619, 644; Kieley *v.* McGlynn, 21 Wall. 503; State *v.* McGlynn, 20 Cal. 234; 81 Am. Dec. 118; Archer *v.* Meadows, 33 Wis. 166

[4] Wallace *v.* Walker, 37 Ga. 265; 92 Am. Dec. 70.

[5] Buchanan *v.* Matlock, 8 Humph. (Tenn.) 390; 47 Am. Dec. 622.

[6] Morningstar *v.* Selby, 15 Ohio, 345; 45 Am. Dec. 579; Matter of Sinclair's Will, 5 Ohio St. 291.

a will should not fall within the jurisdiction in probate matters as well as the probate of one that is produced.

In some of the states, provision is made for the contest of a will, within a limited time after it is probated, by proceedings brought for that purpose. Such a proceeding is a direct attack upon the order probating the will, the first probate being in the nature of the probate in common form, and the second in the nature of a proceeding in equity and similar to the probate in solemn form in England.[1]

It is held that, under such proceedings, the court has no jurisdiction to construe the will in controversy, and that the only question to be determined is will or no will.[2]

Notice to the heirs and others interested is necessary in the proceeding to contest, and any one not notified, or appearing, may assert his rights under the will, as originally probated, notwithstanding a decree in the subsequent proceeding declaring the will invalid.[3] And provision is sometimes made by statute for the contest of a will, after probate in the probate court, by bill in a court of chancery.[4]

A will can not be probated before the death of the testator, and a statute authorizing such a probate is inoperative and not binding upon the courts.[5]

So it is held that where, at the time of the death of the testator, there was no law providing for the probate of wills, a probate court has no jurisdiction to probate the same under a statute subsequently enacted, unless the statute is made retrospective by its express words.[6] And

[1] McArthur *v.* Scott, 113 U. S. 340; 5 Sup. Ct. Rep. 652, 664; Mears *v.* Mears, 15 Ohio St. 90; Redmond *v.* Collins, 4 Dev. (N. Car.) 430; 27 Am. Dec. 208.

[2] McArthur *v.* Scott, 113 U. S. 340; 5 Sup. Ct. Rep. 652; Mears *v.* Mears, 15 Ohio St. 90, 96.

[3] Holt *v.* Lamb, 17 Ohio St. 374; McArthur *v.* Scott, 113 U. S. 340; 5 Sup. Ct. Rep. 652.

[4] Dower *v.* Seeds, 28 W. Va. 113, 134; 57 Am. Rep. 646.

[5] Lloyd *v.* Wayne Circuit Judge, 56 Mich. 236; 23 N. W. Rep. 28.

[6] Grimes *v.* Norris, 6 Cal. 621; 65 Am. Dec. 545, 547, note; Tevis *v.*

the probate of a will is not necessary to its validity unless made so by statute.[1]

The question often arises whether the notice necessary to vest the court with jurisdiction has been given, and whether a finding by the court that such notice was given is conclusive on a collateral attack. The general rule on the subject is that a finding of notice by the court is conclusive when its jurisdiction is brought in question collaterally in the state in which the court is situate.[2] But cases may be found which hold to the contrary.[3]

The power to appoint guardians is usually confined to minors or other persons residing within the jurisdiction of the court. But it may be extended to non-residents having property within such jurisdiction.[4]

By an order of final distribution and discharge of the administrator the jurisdiction of the court is exhausted.[5] And such order when made by a competent court having jurisdiction is conclusive as against a collateral attack.[5]

The probate of a will taken within the county, or other territorial jurisdiction of the court, but not at the county seat, is not void.[6]

It is unnecessary, in this connection, to consider the necessity of notice in probate proceedings to give the court jurisdiction. The general principle that notice of some character is necessary to give jurisdiction is applicable to this class of proceedings.[7] And notice is necessary, although no provision is made for it by the statute authorizing the proceeding.[8]

Pitcher, 10 Cal. 465; McNeil *v.* Congregational Society, 66 Cal. 105, 108; 4 Pac. Rep. 1096.

[1] Grimes *v.* Norris, 6 Cal. 621; 65 Am. Dec. 545; Adams *v.* Norris, 23 How. 353.

[2] *Ante*, sec. 23, pp. 122, 145, 146.

[3] *Ante*, sec. 23; Wise *v.* Williams, 88 Cal. 30, 34; 25 Pac. Rep. 1064.

[4] Davis *v.* Hudson, 29 Minn. 27; 11 N. W. Rep. 136.

[5] Lowry *v.* McMillan, 35 Miss. 147; 72 Am. Dec. 119.

[6] Le Grange *v.* Ward, 11 Ohio, 258.

[7] See *ante*, secs. 11, 13, 20, 23, 25, 32, 33; *post*, sec. 76; Root *v.* McFerrin, 37 Miss. 17; 75 Am. Dec. 49.

[8] Chase *v.* Hathaway, 14 Mass. 222.

68. Special cases and proceedings.—The builders of some of the codes of procedure in the states seemed to fear that the "actions" of such codes would not cover all of the civil remedies that might be sought in the courts. To avoid such a contingency it is provided that remedies shall be divided into two classes, "actions" and "special proceedings."[1] An action is defined.[2]

The use of the word "ordinary" in the code definition of an action would seem to have caused the whole trouble.[3]

A special proceeding has not been defined by the codes. After defining an action every other remedy is declared to be a special proceeding.[4] That is to say, in effect, "every prosecution in a court of justice, by a party against another party, for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense, *other than an ordinary prosecution*, is *extraordinary*, and is a special proceeding."[5] Thus we have fastened upon the law of jurisdiction and procedure an excrescence that has caused courts and lawyers much useless

[1] Code Civ. Pro. Cal., sec. 21.

[2] "The word 'action' signifies an ordinary prosecution, in a court of justice, by a party against another party, for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense." Throop's Code Civ. Pro. N. Y., sec. 3333; Code Civ. Pro. Cal., sec. 22.

[3] People *v.* Lewis, 28 How. Pr. 159, 161; People *v.* Main, 20 N. Y. 434.

[4] "Every other prosecution by a party for either of the purposes specified in the last section is a special proceeding." Throop's Code Civ. Pro. N. Y., sec. 3334. See also Code Civ. Pro. Cal., sec. 23. These codes are cited as samples.

[5] In California one "part" of the code is devoted to special proceedings of a civil nature. Under this division are included writs of review, writs of mandate, contests of elections, summary proceedings including confession of judgment without action, submitting a controversy without action, discharge of persons imprisoned on civil process, and summary proceeding for obtaining possession of real property in certain cases including forcible entry and detainer; enforcement of liens including mechanics' liens and liens for salaries and wages, contempts, voluntary dissolution of partnerships, eminent domain, proceedings to recover escheated estates, change of names, arbitrations, and proceedings in probate courts, including the settlement of guardianships. Code Civ. Pro. Cal., Part III.

trouble and litigant parties much unnecessary expense, delay, and injustice, and has brought into the law of the states in which these code provisions were enacted much unnecessary uncertainty. The courts have been endeavoring ever since the codes were enacted to define special proceedings, or ascertain and mark out the dividing line between such proceedings and ordinary actions, but with very indifferent success.[1]

In some of the cases, the distinction between an action and a special proceeding is held to be that a proceeding instituted by summons and complaint is an action, and that every other remedy is a special proceeding.[2] But this would include proceedings under all of the well known common-law writs and many other actions that only differ from those in which a summons is issued in the manner of giving notice, and a change, by statute, of the manner of giving notice; might, under such a distinction, convert any action into a special proceeding. It is obvious that the division between the two does not lie there.

The mind would naturally tend to the conclusion that the ordinary action was intended to include all common-law and equity remedies that were being enforced by courts of law and equity at the time the constitution and statutes dividing the proceedings into actions and special cases and special proceedings went into effect. But this has been emphatically denied in a case in which a suit for the foreclosure of a mortgage was held to be a special case.[3]

In some of the cases the position is taken that by the term special cases used in some of the constitutions authorizing the legislature to confer jurisdiction on inferior courts, enumerated cases was intended; and that the legis-

[1] Belknap *v.* Waters, 11 N. Y. 477; Arnold *v.* Rees, 18 N. Y. 57; Doubleday *v.* Heath, 16 N. Y. 80; Appeal of Houghton, 42 Cal. 35; McNeil *v.* Borland, 23 Cal. 144; Haviland *v.* White, 7 How. Pr. 154; Matter of Cooper, 22 N. Y. 67, 86; Boyd *v.* Bigelow, 14 How. Pr. 511; Extension of the Bowery, 12 How. Pr. 97; Ricks *v.* Reed, 19 Cal. 551, 574.

[2] Belknap *v.* Waters, 11 N. Y. 477; Hall *v.* Hall, 78 N. Y. 535, 542.

[3] Arnold *v.* Rees, 18 N. Y. 57.

lature may, by specially designating the cases of which such courts may take jurisdiction, convert them all into special cases, and thereby give the inferior courts jurisdiction of the whole mass of judicial business, legal and equitable.[1] But this is certainly not the generally accepted meaning of the term, as will appear a little further on in this section.

The cases on the subject alone are convincing to establish the fact that they are wholly at variance with each other and that a special case or a special proceeding is an unknown quantity, and, therefore, can neither be defined nor accurately described. The division of actions thus made, or attempted to be made, is worse than superfluous, because it has brought about many distinctions between the two classes of cases respecting the jurisdiction of courts over them, which would never have existed under the codes if the term "action" or "civil action," as it is termed in some of the codes, had been so defined as to cover all proceedings in a court of justice whether ordinary or extraordinary.

The subject of special cases and proceedings becomes important in this connection only because the courts have maintained that because they are special and extraordinary, the courts, when exercising jurisdiction over them, are courts of special jurisdiction, that their power to act must affirmatively appear by their records, and that no presumptions will be indulged in favor of their jurisdiction when acting in such proceedings.[2]

This is a distinction that should have no place in the law, and the sooner it is wholly and entirely repudiated the better. But we must deal with the law as it is and not as it is believed it should be. It is one that is not adhered to in many cases and proceedings that are wholly statutory. This is particularly noticeable in probate proceedings which are classed as special in the codes. Courts of probate are generally, but not always, held at the pres-

[1] Arnold *v.* Rees, 18 N. Y. 57; People *v.* Main, 20 N. Y. 434.

[2] *Ante*, secs. 20, 23, 25; Chollar Min. Co. *v.* Wilson, 66 Cal. 374; 5 Pac. Rep. 670.

ent day to be courts of general jurisdiction in the transaction of probate business, but a different rule is maintained in some of the states.[1]

It is further maintained in some of the cases that in the case of statutory proceedings great strictness is required, and the steps necessary to vest the court with jurisdiction, including the giving of notice, must appear to have been taken in strict compliance with the terms of the statute.[2] But this doctrine, like the other, is purely arbitrary and artificial. It has no basis in reason. There should be no difference in this respect between a remedy given and regulated by statute, and one that existed at common law. And the rule has very justly been confined to summary or extraordinary *ex parte* proceedings. In other cases, not summary in their nature, a substantial compliance with the statute is all that is necessary.[3] And where the jurisdiction of the court in this class of proceedings depends upon a fact or facts to be found by the court, a finding that such facts exist is conclusive, on collateral attack.[4] There are cases holding, however, that this is not so where

[1] *Ante*, sec. 67.

[2] *Ante*, sec. 20; Bloom *v.* Burdick, 1 Hill, 130; 37 Am. Dec. 299.

[3] *Ante*, sec. 20, p. 94; Post, sec. 76; White *v.* Conover, 5 Blkf. (Ind.) 462; Morrow *v.* Weed, 4 Ia. 77; 66 Am. Dec. 122; Bowman *v.* Venice, etc., Ry. Co., 102 Ill. 472; Kreiss *v.* Hotaling, 96 Cal. 617, 620; 31 Pac. Rep. 740; Hill *v.* Board of Supervisors, 95 Cal. 239; 30 Pac. Rep. 385.

"But it is urged with earnestness, that this being a statutory proceeding, great strictness is required. It is true it is a statutory proceeding, but it is not a summary *ex parte* proceeding, where the parties whose rights are to be affected have no opportunity to be heard. Applications for partition of lands, and the assignment of dower, and the action of replevin, are statutory, and yet no one thinks of insisting upon the strictness that is applied to *ex parte* proceedings. The fact that a proceeding is statutory is not enough to require the application of the rigid rules of strictness, but it only applies in summary and *ex parte* cases, where the person whose rights are to be affected is not a party. Such is not the case here, as owners and those having an interest are required not only to be made parties, but to be served with process." Bowman *v.* Venice, etc., Ry. Co., 102 Ill. 472, 475.

[4] *Ante*, secs. 23, 25; In re Grove street, 61 Cal. 438; Humboldt Co. *v.* Dinsmore, 75 Cal. 604; 17 Pac. Rep. 710; Ex parte Noble, 96 Cal. 362; 31 Pac. Rep. 224; Ex parte Sternes, 77 Cal. 156, 162; 19 Pac. Rep. 275.

a petition is required to be filed, signed by a certain number of persons possessing certain designated qualifications, and the court has recited in its records that the petition was so signed, and has proceeded to act upon it.[1] Undoubtedly a finding of this kind is subject to attack in a direct proceeding, but there is no apparent reason why a finding of such a fact, necessary to give the court jurisdiction, should not be conclusive on a collateral attack as well as a finding of the existence of any other fact necessary to give jurisdiction.

The rules with reference to these special cases and proceedings, as respects the jurisdiction of courts over them, are the same, practically, as those affecting the jurisdiction of inferior courts, which have been considered.[2] The subject will also receive further attention when we come to consider the subject of sales of real estate.[3] The principal object of this section is to direct attention to these special cases and proceedings, and to ascertain, as nearly as we can, what are included within them without repeating what has been said elsewhere with reference to the jurisdiction of the courts over them.

Taking the State of California as a sample of this kind of legislation and its effect, we have a very large body of its laws, and the most important of its writs, and writs that were well known at common law, and the whole body of its probate law and procedure classed in its code as special proceedings and subjected to the pernicious doctrine that no presumption will prevail to uphold the jurisdiction of the courts therein, because the proceedings are statutory and special. Happily, the courts have not classed all of these proceedings as special, but have held many of them to be included in the code definition of an action.[4]

[1] *Ante*, sec. 23, p. 126; Kahn *v.* Board of Supervisors, 79 Cal. 388, 396; 21 Pac. Rep. 849; In re Madera Irrigation District, 92 Cal. 296, 331; 28 Pac. Rep. 272.

[2] *Ante*, secs. 20, 23, 25. [3] *Post*, sec. 76.

[4] People *v.* County Judge, 13 How. Pr. 398; People *v.* Lewis, 28 How. Pr. 159; Lord *v.* Dunster, 79 Cal. 477; 21 Pac. Rep. 865; Brock *v.* Bruce, 5 Cal. 279.

This was held as to mechanics' liens,[1] and writs of mandamus,[2] actions to enforce mechanics' liens,[3] and statutory actions in the nature of *quo warranto*.[4]

[1] The case of People *v.* County Judge, 13 How. Pr. 399, 400, related to a mechanic's lien which, as has been shown, is classed in the California Code as a special proceeding. In that case, the court said:

"Various attempts have been made to define an action. The last, of which I am aware, is that made in framing the code. Its definition, as now amended, is, that it is an ordinary proceeding in a court of justice, by which one party prosecutes another for the enforcement of a right, etc. It must be conceded, I think, that this definition is not remarkable for its perspicuity or distinctness. I suppose, myself, that any judicial proceeding which, if conducted to a termination, will result in *a judgment*, is an action. Hence the definition of a judgment, as given in the 245th section of the code, is, that it is the final determination of the rights of the parties *in an action*.

"There are various modes of commencing an action. In courts of record, since the adoption of the code, it must be by summons, served upon the party in some one of the modes prescribed or by voluntary appearance, which is regarded as equivalent to a personal service. Other modes have been and may be prescribed in particular cases. In justices' courts it may be commenced by summons, warrant, or attachment, or in whatever mode the legislature may prescribe, The character and effect of the judgment may differ, according to the mode in which the action is commenced; but, if the proceeding result in a judgment, it is an action.

"Applying this test to the adjudications in question, there can be no doubt that they are *judgments in civil actions*. It is true, the proceedings were instituted by the service of what the statute calls a notice, requiring the defendant to appear, etc. But, whether the defendant appear according to the exigency of this notice or not, the court proceeds to dispose of the case, as it does other cases after due service of process. If the defendant does not appear, judgment upon default is rendered against him, as in other cases. If he does appear, issue is to be joined, and then the parties proceed to trial and judgment in all respects as in other cases."

[2] People *v.* Lewis, 28 How. Pr. 159, 172; People *v.* Kern County, 45 Cal. 679.

But see to the contrary, Jacks *v.* Day, 15 Cal. 91; People *v.* Schoonmaker, 19 Barb. 657.

It was held otherwise in the special term where the ground was taken

---

[3] Brock *v.* Bruce, 5 Cal. 279; Williams *v.* Walton, 9 Cal. 142.

But see to the contrary, McNeil *v.* Borland, 23 Cal. 144; Van Winkle *v.* Stow, 23 Cal. 458; People *v.* County Judge, 13 How. Pr. 399.

[4] People *v.* Perry, 79 Cal. 105; 21 Pac. Rep. 423.

Many other well known cases and proceedings must fall within this class under the principles laid down in these cases. The fact that a certain action is classed in the code as a special proceeding does not make it so. This must be determined from the nature and character of the proceeding.[1] The following have been held to be special proceedings: A motion by one not a party thereto to vacate a judgment upon confession;[2] proceedings for the partition of real estate under a statute;[3] proceedings for the removal of officers of a corporation;[4] contest of elections;[5]

by the court that mandamus is not an ordinary proceeding, and therefore not within the code definition of an action.

"It is not a question whether a proceeding by mandamus when it progresses to a return, may or may not be in some sense regarded as 'an action' or 'a suit,' which is more comprehensive than an action, and be so styled. We have to do with a statutory definition and division of legal remedies into 'actions' and 'special proceedings.' An action is declared to be an 'ordinary proceeding' in a court of justice by which a party prosecutes, etc.; and a 'special proceeding' embraces every other remedy (Code, secs. 2, 3). Section 2 is broad enough in terms, when speaking of the purposes and objects for which 'an action' may be brought, to embrace and include every legal proceeding. For there can be no legal process or procedure except 'for the enforcement of a right, the redress or prevention of a wrong, or the punishment of a public offense.' The material and distinctive part of the definition is the words 'ordinary proceeding.' This distinguishes an action from an extraordinary or special proceeding, and restricts the term to a procedure which would answer to an ordinary action at law or suit in equity.

"Now a mandamus is not an ordinary proceeding. It is known as a high prerogative writ, and it is issued in the exercise of an extraordinary power, and, although it is to a certain extent assimilated to an action, it is not made an action. The court grants the writ in the exercise of its general supervisory power, and to prevent a failure of justice, and when there is no other specific legal remedy for a legal right. It is not a writ of right, but is granted in the discretion of the court." People *v.* Lewis, 28 How. Pr. 159, 161.

[1] Lord *v.* Dunster, 79 Cal. 477; 21 Pac. Rep. 865.

But see on this point Kundolf *v.* Thalheimer, 2 Kern, 593; Arnold *v.* Rees, 18 N. Y. 57.

[2] Belknap *v.* Waters, 11 N. Y. 477.

[3] Doubleday *v.* Heath, 16 N. Y. 80.

[4] Chollar *v.* Wilson, 66 Cal. 374; 5 Pac. Rep. 670.

[5] Saunders *v.* Haynes, 13 Cal. 145; Stone *v.* Elkins, 24 Cal. 125; Dorsey *v.* Barry, 24 Cal. 449; Keller *v.* Chapman, 34 Cal. 635.

But see Lord *v.* Dunster, 79 Cal. 477; 21 Pac. Rep. 865.

taking recognizance of bail;[1] suit to foreclose a mortgage;[2] proceedings for the grading of streets;[3] and to condemn real estate for public or *quasi* public purposes.[4] But a distinction is made between a proceeding to condemn land, in which the general procedure in civil actions must be resorted to, and one that is wholly special.[5] Actions to enforce mechanics' liens;[6] proceedings in insolvency;[7] proceedings in a probate court to determine heirship to the estate of a decedent;[8] and an application for admission as an attorney.[9]

The different kinds of actions or proceedings held by the courts to belong to one or the other of the classes mentioned are given as tending to illustrate the distinction that is made and the principles upon which it is maintained. But the cases are so divided on many of the proceedings passed upon as to render them of but little value.

In some of the codes, as has been shown, proceedings by administrators or executors for the sale of real estate to pay debts are classed as special proceedings. But it is usually held that they are proceedings *in rem*, and when had in a court of general jurisdiction, all presumptions are in favor of the jurisdiction of the court.[10] And probate courts are usually held to be courts of general jurisdiction when dealing with such questions.[11]

In some of the constitutions, the legislature is author-

[1] People *v.* Main, 20 N. Y. 434.

[2] Arnold *v.* Rees, 18 N. Y. 57.

[3] Appeal of Houghton, 42 Cal. 35.

[4] S. P. & N. R. Co. *v.* Harlan, 24 Cal. 334.

[5] S. F. & S. J. R. R. Co. *v.* Mahoney, 29 Cal. 112.

[6] McNeil *v.* Borland, 23 Cal. 144.

But see to the contrary, Brock *v.* Bruce, 5 Cal. 279; Williams *v.* Walton, 9 Cal. 142.

[7] In re Dennery, 89 Cal. 101; 26 Pac. Rep. 639.

[8] In re Burton, 93 Cal. 459, 463; 29 Pac. Rep. 36; Smith *v.* Westerfield, 88 Cal. 374; 26 Pac. Rep. 206.

[9] Matter of Cooper, 22 N. Y. 67, 86.

[10] *Post*, sec. 76; Grignon's Lessee *v.* Astor, 2 How. 319, 338; Florentine *v.* Barton, 2 Wall. 210.

[11] *Ante*, secs. 67; *post*, sec. 76.

ized to confer jurisdiction upon inferior courts in "special cases," which has given rise to complications and uncertainties similar to those growing out of the code distinction between actions and special proceedings. It has been held that the term "special cases," as thus used, was not meant to include any class of cases for which courts of general jurisdiction had always supplied a remedy, and that special cases must be confined to such new cases as are the creation of statutes, and the proceedings under which are unknown to the general framework of courts of common law and equity.[1] And the same meaning is given to the term "special proceeding" used in the code.[2]

Under a provision of the constitution conferring jurisdiction upon a court "of all special cases not otherwise provided for," such courts are held to take jurisdiction of all such cases that are not otherwise provided for, and to hold such jurisdiction until given to some other court.[3] So in case of a similar grant of jurisdiction in criminal cases.[4] But when such jurisdiction is conferred by the legislature upon some other tribunal, it becomes a case otherwise provided for, and the jurisdiction of the first named court is taken away and that of the latter becomes exclusive.[4]

69. Criminal jurisdiction.—Jurisdiction in criminal cases is now almost entirely governed and controlled by express statutory and constitutional provisions. This is true of the federal as well as the state courts.

[1] Parsons *v.* Tuolumne Co. Water Co., 5 Cal. 43; 63 Am. Dec. 76; Spencer Creek Water Co. *v.* Vallejo, 48 Cal. 70; Bixler's Appeal, 59 Cal. 550.

But see Arnold *v.* Rees, 18 N. Y. 57.

[2] Appeal of Houghton, 42 Cal. 35.

As to what are "special cases" within the meaning of these constitutional provisions, see Spencer Creek Water Co. *v.* Vallejo, 48 Cal. 70; Parsons *v.* Tuolumne Co. Water Co., 5 Cal. 43; 63 Am. Dec. 76; Bixler's Appeal, 59 Cal. 550.

[3] Spencer Creek Water Co. *v.* Vallejo, 48 Cal. 70.

[4] Green *v.* Superior Court, 78 Cal. 556; 21 Pac. Rep. 307, 541.

Jurisdiction in civil and in criminal cases differs materially with respect to the foundation of territorial jurisdiction. In civil cases, affecting the person, the residence of the defendant, or the place of service of process, determines, as a general rule, the jurisdiction of the court,[1] while in criminal cases the place where the crime was committed fixes the jurisdiction.[2] It makes no difference, therefore, whether the accused is a resident or citizen of the state or not. An alien or citizen of another state is subject to prosecution and punishment for a violation of the laws of a state committed therein.[3] Nor is it necessary that the party committing the offense should, at the time of the commission of it, be actually within the state. For example, a party in one state may, through innocent agents, commit an offense against the laws of another state, and within its borders, and thus render himself amenable to prosecution in the latter state.[4] So he may, while in one state, commit an offense in another state by other means.[5] But one can not be punished in a state where a crime is committed who was merely an accessory before the fact to such crime in another state.[6] He is answerable in the courts of the state in which he acted.[7] Nor can he be so punished where the offense was actually consummated in another state, although some act constituting a part of the offense, or making the offense possible, was committed within the state.[8]

[1] *Ante*, secs. 13, 15.

[2] Campbell *v.* People, 109 Ill. 565; 50 Am. Rep. 621; In re Rosdeitscher, 33 Fed. Rep. 657.

[3] McDonald *v.* State, 80 Wis. 407; 50 N. W. Rep. 185; State *v.* Chapin, 17 Ark. 561; 65 Am. Dec. 452.

[4] Johns *v.* State, 19 Ind. 421; 81 Am. Dec. 408; People *v.* Adams, 3 Denio, 190; 45 Am. Dec. 468; State *v.* Chapin, 17 Ark. 561; 65 Am. Dec. 452; Commonwealth *v.* Blanding, 20 Mass. 304; 15 Am. Dec. 214.

[5] Johns *v.* State, 19 Ind. 421; 81 Am. Dec. 408; People *v.* Adams, 3 Denio, 190; 45 Am. Dec. 468; Hatfield *v.* Commonwealth, 12 S.W. Rep. 390.

[6] Johns *v.* State, 19 Ind. 421; 81 Am. Dec. 408; State *v.* Chapin, 17 Ark. 561; 65 Am. Dec. 452.

[7] State *v.* Chapin, 17 Ark. 561; 65 Am. Dec. 452.

[8] Stewart *v.* Jessup, 51 Ind. 413; 19 Am. Rep. 739; State *v.* Shaeffer, 89 Mo. 271; 1 S. W. Rep. 293.

A different rule is laid down under statutory provisions in some of the states with respect to counties.[1] Where no statute on the subject prevails, the jurisdiction exists where the crime is consummated or completed.[2] The general rule is, that the laws of a state can have no extra-territorial force or effect.[3] But a state may pass laws in regard to its own citizens which will be binding and obligatory upon them when without its territorial limits, and make the violation of such laws, by the commission of an act outside of the state, a criminal offense; and the offender may be punished in its courts whenever found within its jurisdiction.[4]

Proceedings may be had before a court outside of the state where the offense was committed for the purpose of apprehending the criminal when demanded by the authorities of the proper state, but the jurisdiction in such cases is ancillary to the jurisdiction of the courts of the state where the offense was committed, and can only be exercised in order to bring the accused within the jurisdiction of the court having authority to try him.[5] And usually, as between the states, this is done through the executive departments without the aid of the courts. A state has power to provide for the arrest and detention of one accused of crime in advance of a demand made by the proper state authorities.[6] But such a statute must be strictly pursued or the accused is entitled to be discharged.[6]

It has been held that the state courts have no jurisdiction over an offense committed within the state by one Indian against another when both are members of an organized tribe, having laws for the government of their own internal affairs, which tribe is recognized and treated with, as such, by the federal government.[7] But a state

[1] In re McFarland, 13 N. Y. Supl. 22; State *v.* Smith, 82 Ia. 423; 48 N. W. Rep. 727.

[2] People *v.* Rathburn, 21 Wend. 509.

[3] *Ante*, secs. 15, 33.

[4] State *v.* Main, 16 Wis. 398.

[5] In re Rosdeitscher, 33 Fed. Rep. 657.

[6] Ex parte Rosenblat, 51 Cal. 285.

[7] State *v.* McKenney, 18 Nev. 182; 2 Pac. Rep. 171.

court has jurisdiction to try a full-blooded Indian for the killing of another full-blooded Indian, where it does not appear that the accused belonged to such a tribe.[1]

The means by which the defendant has been brought within the jurisdiction of the court does not affect its right to try him.[2] Therefore it is held that the question as to the legality of the proceedings by which a party was extradited and brought from a foreign country into the state is immaterial as affecting the jurisdiction of the court.[3] But the proceedings for the extradition of one accused of crime, under a treaty authorizing it, may limit the jurisdiction of the court. For example, if one is extradited for the commission of a designated crime, he can not, after being brought into this country, be prosecuted for an entirely different and distinct offense, until he has been set at liberty and given an opportunity to return to the country from which he was taken.[4] The extradition from a foreign country, although for the violation of a state law, must be negotiated through the federal government.[4] And the federal courts may protect the party from prosecution, in a state as well as in the federal courts, for an offense other than the one for which he was extradited.[5] But where the accused has been brought from a foreign country, not under or by virtue of a treaty with such country, but by unlawful force and against his will, and is being tried in a state court, the federal courts have no power to interfere.[6] The fact that the wrongful abduction

[1] People *v.* Ketchum, 73 Cal. 635; 15 Pac. Rep. 353.

[2] People *v.* Pratt, 78 Cal. 345; 20 Pac. Rep. 731; Ex parte Ah Men, 77 Cal. 198; 19 Pac. Rep. 380; Mahon *v.* Justice, 127 U. S. 708; 8 Sup. Ct. Rep. 1204; In re Mahon, 34 Fed. Rep. 525; Brooken *v.* State, 26 Tex. App. 121; 9 S. W. Rep. 735; State *v.* Brewster, 7 Vt. 118; Ker *v.* Illinois, 119 U. S. 436; 7 Sup. Ct. Rep. 225; Dow's case, 18 Pa. St. 37; State *v.* Ross, 21 Ia. 467; Kingen *v.* Kelley, 3 Wyo. 266; 28 Pac. Rep. 36. But see State *v.* Simmons, 39 Kan. 262; 18 Pac. Rep. 177.

[3] People *v.* Pratt, 78 Cal. 345; 20 Pac. Rep. 731.

[4] United States *v.* Rauscher, 119 U. S. 407; 7 Sup. Ct. Rep. 234.

[5] United States *v.* Rauscher, 119 U. S. 407; 7 Sup. Ct. Rep. 234; Ker *v.* Illinois, 119 U. S. 436; 7 Sup. Ct. Rep. 225.

[6] Ker *v.* Illinois, 119 U. S. 436; 7 Sup. Ct. Rep. 225; Mahon *v.* Justice, 127 U. S. 708; 8 Sup. Ct. Rep. 1204.

was by the officers of the state does not change the rule.[1]

The accused must be before the court. It is not enough that process be served upon him. His actual presence and attendance in court is necessary to authorize the court to proceed against him.[2] The actual presence of the defendant, after having once been brought before the court, is dispensed with by statute in some of the states in prosecutions for minor offenses. But unless so dispensed with, the attendance of the accused at every stage of the proceeding is necessary.

The fact that the crime was committed within the jurisdiction of the court must be alleged in the indictment or information in order to vest the court with jurisdiction.[3] This allegation is dispensed with, by statute, in some of the states, and the same left to be determined by the proof at the trial.[4]

Where the court has jurisdiction over a part of a county only, it must be alleged that the offense was committed within that part of the county over which its jurisdiction extends.[3] It is otherwise in some of the states, but this is by reason of a statute rendering the allegation unnecessary.[4]

Whether the offense was committed within the jurisdiction of the court or not is one of fact to be determined by the jury, when properly alleged in the indictment, and may be controverted under a plea of not guilty. The burden is upon the prosecution to establish the fact that the offense was committed within the jurisdiction of the court.[5] And a finding by the court of the facts necessary to give it jurisdiction, when properly alleged, is conclusive on a collateral attack.[6] But proof of the venue is ab-

[1] Kingen *v.* Kelley, 3 Wyo. 266; 28 Pac. Rep. 36.
[2] Bigelow *v.* Stearns, 19 Johns. 39; 10 Am. Dec. 189.
[3] People *v.* Wong Wang, 92 Cal. 277; 28 Pac. Rep. 270.
[4] Toole *v.* State, 8 Sou. Rep. 95.
[5] People *v.* More, 68 Cal. 500; 9 Pac. Rep. 461.
[6] Ex parte Noble, 96 Cal. 362; 31 Pac. Rep. 224

solutely necessary to sustain a conviction on appeal.[1] But this may be shown by circumstantial or indirect evidence.[2]

The question can not, in such case, be raised by demurrer, motion to set aside or quash the indictment, or motion in arrest of judgment because not appearing on the face of the record.[3] But it may be raised by a plea in abatement, where jurisdiction is denied, and must be shown by extraneous evidence.[4] But if not alleged in the indictment, it may be reached by demurrer, when a demurrer is permitted in criminal cases, as it is in some of the states, or by motion to quash or set aside the indictment, or by motion in arrest of judgment.[5] And if a court is given jurisdiction of a certain class of crimes, only in certain specified cases, or under certain specified circumstances, the facts necessary to bring the case within the statute must be alleged.[6] But it is held that where a court is given jurisdiction only after the lapse of a designated length of time after the commission of the offense, the burden is upon the defendant to show that the time has not expired.[7] But when it appears from the evidence at the trial that the time had not expired when the prosecution was instituted, the court is without jurisdiction and the cause must be dismissed.[8]

Where the indictment is presented before the expiration of the time, the whole proceeding is absolutely void and is no bar to a subsequent prosecution.[9] But if the

[1] State *v.* McGinnis, 74 Mo. 245; People *v.* Parks, 44 Cal. 105; People *v.* Bevans, 52 Cal. 470; Mullinix *v.* State, 43 Ind. 511; Stazey *v.* State, 58 Ind. 514; State *v.* Hartinet, 75 Mo. 251.

[2] State *v.* McGinnis, 76 Mo. 326; Beavers *v.* State, 58 Ind. 530; State *v.* Hartinet, 75 Mo. 251.

[3] People *v.* More, 68 Cal. 500; 9 Pac. Rep. 461.

[4] Hoover *v.* State, 110 Ind. 349; 11 N. E. Rep. 434.

[5] Justice *v.* State, 17 Ind. 56.

[6] Justice *v.* State, 17 Ind. 56; McCarty *v.* State, 16 Ind. 310; Broadhurst *v.* State, 21 Ind. 333; Cobb *v.* State, 27 Ind. 133; Davis *v.* State, 69 Ind. 130; Klaise *v.* State, 27 Wis. 462; State *v.* Porter, 101 N. Car. 713; 7 S. E. Rep. 902.

[7] State *v.* Shelly, 98 N. Car. 673; 4 S. E. Rep. 530.

[8] State *v.* Porter, 101 N. Car. 713; 7 S. E. Rep. 902.

[9] State *v.* Cooper, 104 N. Car. 890; 10 S. E. Rep. 510.

offense charged in the indictment or information is one of which the court has jurisdiction, but the evidence shows the accused to be guilty of a lesser offense, included within the one charged, the jurisdiction of the court is not ousted, although it would not have had jurisdiction of the lesser offense if the same had been charged.[1]

Where a court is only authorized to issue a warrant upon evidence of the guilt of the party named therein, there must be some evidence of his guilt to vest the court with jurisdiction. And it is held that an affidavit expressing a mere opinion to that effect is not enough.[2] But some proof, however slight, having a legal tendency to make out a proper case for the issuance of the warrant, will render the proceeding valid upon a collateral attack.[3]

There are statutory exceptions to the rule that a defendant can only be tried in the county, or other defined territory, in which the offense was committed. For example, in cases of larceny and other similar offenses it is sometimes provided that the offense may be prosecuted either in the county where the property was stolen, or in any county into which the stolen property was taken or found.[4] So when stolen property is brought by the thief into any county from another state or country.[5] So where the offense is committed partly in one and partly in another county.[6]

In cases of murder it is now usually provided by statute that the prosecution may be had where the fatal blow was struck, although the death may have occurred in another county, or even in another state; and such statutes are

[1] State *v.* Fesperman, 108 N. Car. 770; 13 S. E. Rep. 14.

[2] Ex parte Dimmig, 74 Cal. 164; 15 Pac. Rep. 619; Ex parte Spears, 88 Cal. 640, 642; 26 Pac. Rep. 608.

[3] Miller *v.* Brinkerhoff, 4 Denio, 118; 47 Am. Dec. 242, 243, note.

[4] Campbell *v.* People, 109 Ill. 565; 50 Am. Rep. 621; People *v.* Scott, 74 Cal. 94; 15 Pac. Rep. 384; People *v.* Mellon, 40 Cal. 648; In re McFarland, 13 N. Y. Supl. 22; Steerman *v.* State, 10 Mo. 503.

[5] Haskins *v.* People, 16 N. Y. 344, 348; State *v.* Bennett, 14 Ia. 479.

[6] Archer *v.* The State, 106 Ind. 426; 7 N. E. Rep. 225; Green *v.* State, 66 Ala. 40; 41 Am. Rep. 744.

held to be constitutional.[1] So with reference to a statute authorizing the prosecution in the state where the death occurred, the wound having been inflicted on the high seas or in another state or country.[2]

The necessity for such statutes grew out of the uncertainty of the common law as to jurisdiction in such cases.[3]

Where the property is stolen in one county and taken into another the jurisdiction is, under such a statute, concurrent in the courts of the two counties, and the prosecution may be commenced in either;[4] and the court which first obtains jurisdiction of the person of the accused retains it to the end, no matter in which county the indictment was first found.[5]

In cases of larceny, where property has been stolen in one county and taken into another, it is held to be proper to charge the offense to have been committed in the latter county; and that proof of its having been taken into the latter county by the thief will sustain the allegation and uphold the jurisdiction of the court.[6] This is upon the theory that each asportation of stolen property from one county to another is a new theft.[7] But it is otherwise in the case of a burglary, which is necessarily local in its character. There the fact that goods were carried into the county where the charge is made must be alleged.[8] And some of the cases go further, and hold that the legislature has no power to authorize a prosecution for burglary in a county other than the one in which the crime was

[1] Green *v.* State, 66 Ala. 40; 41 Am. Rep. 744; Hunter *v.* State, 40 N. J. Law, 495, 546; Commonwealth *v.* Parker, 19 Mass. 549.

[2] Commonwealth *v.* MacLoon, 101 Mass. 1; 100 Am. Dec. 89.

[3] Green *v.* State, 66 Ala. 40; 41 Am. Rep. 744; Hunter *v.* State, 40 N. J. Law, 495, 546; Commonwealth *v.* MacLoon, 101 Mass. 1; 100 Am. Dec. 89.

[4] People *v.* Scott, 74 Cal. 94; 15 Pac. Rep. 384; Ex parte Baldwin, 69 Ia. 502; 29 N. W. Rep. 428.

[5] Ex parte Baldwin, 69 Ia. 502; 29 N. W. Rep. 428.

[6] Haskins *v.* People, 16 N. Y. 344; People *v.* Mellon, 40 Cal. 648; People *v.* Scott, 74 Cal. 94; 15 Pac. 384; State *v.* McGraw, 87 Mo. 161.

[7] State *v.* Smith, 66 Mo. 61; State *v.* McGraw, 87 Mo. 161; State *v.* Bennett, 14 Ia. 479.

[8] Haskins *v.* People, 16 N. Y. 344; People *v.* Scott, 74 Cal. 94.

committed.[1] And the fact that an offense committed in one county injuriously affects the public in another county, as in case of a public nuisance, does not authorize a prosecution therefor in the latter.[2]

But it is provided in some of the states that a party may be prosecuted in any county where the acts *or effects* of the act constituting or requisite to the consummation of the offense occur, which changes the rule.[3] But it is held that the statute does not apply where the act constituting the offense was perpetrated in one county, although the result intended to be brought about by the act occurred, later, in another county, and that in such case the crime must be prosecuted in the county where the act was done.[4] And a statute authorizing the prosecution of an offense committed wholly within another state or government has been held to be void.[5] But the remarks made on this subject in the case cited have been characterized as purely *obiter dicta*, and the contrary rule maintained.[6]

Both of these cases were for manslaughter. In the later case the conclusion reached seems to be based, mainly, upon the theory that the blows inflicted, and their effects, carried by the injured party within the jurisdiction of the court, were the continuous operation and effect of the unlawful act and the unlawful intent with which the wound was administered attended and qualified the act until its final result. It must be conceded that this case is in conflict with cases respecting other crimes which do not seem to differ, in principle, from that of manslaughter. Cases holding the right to prosecute in the state in which the result of the act rather than the act itself transpired are usually cases in which the act itself, or a series of acts,

[1] State *v.* McGraw, 87 Mo. 161; Ex parte Slater, 72 Mo. 106.

[2] In re Eldred, 46 Wis. 530; 1 N. W. Rep. 175. But see Commonwealth *v.* MacLoon, 101 Mass. 1; 100 Am. Dec. 89.

[3] In re McFarland, 13 N. Y. Supl. 22; State *v.* Smith, 82 Ia. 423; 48 N. W. Rep. 727; State *v.* Hollenbeck, 36 Ia. 112.

[4] State *v.* Hollenbeck, 36 Ia. 112.

[5] State *v.* Carter, 27 N. J. Law, 499.

[6] Commonwealth *v.* MacLoon, 101 Mass. 1, 20; 100 Am. Dec. 89.

was continuous and reached into the state. The case last referred to carries the rule to the furthest extremity, certainly, if not beyond it.[1]

The law requiring the prosecution of the offense within the county where it was committed rests mainly upon the right to a trial by a jury of the county or neighborhood.[2]

This was a right that existed at common law and, under constitutional provisions guaranteeing the right of trial by jury it is a right that can not be taken away by legislative enactment.[3] This is held to be subject, however, to the right of the legislature to provide for the trial of certain offenses in either of two or more counties in the state as above mentioned.[4] It is a right that may be waived by the accused by a demand for a change of venue to another county, but a statute authorizing a change of venue to another county at the instance of the district attorney or other prosecuting officer, without the consent of the defendant, is unconstitutional and void.[5]

Not only is the defendant entitled to a trial within the county where the offense was committed, but he is entitled to have the jury selected from such county.[6]

As a change of venue may be taken by a defendant, it is not always necessary that a case shall be tried in the county where the crime is charged to have been committed, although it must be commenced there.[7]

[1] See, further, on this subject, Commonwealth *v.* Parker, 19 Mass. 549.

[2] In re Eldred, 46 Wis. 530; 1 N. W. Rep. 175; People *v.* Powell, 87 Cal. 348; 25 Pac. Rep. 481; Wheeler *v.* State, 24 Wis. 52; State *v.* Howard, 31 Vt. 414; Swart *v.* Kimball, 43 Mich. 448; 5 N. W. Rep. 635; Buckrice *v.* People, 110 Ill. 29.

[3] Kirk *v.* State, 41 Tenn. 344; Wheeler *v.* State, 24 Wis. 52; Osborn *v.* State, 24 Ark. 629; Ex parte Rivers, 40 Ala. 712; State *v.* Knapp, 40 Kan. 148; Koppikus *v.* State Capital Commissioner, 16 Cal. 249; Cooley Const. Lim., 5th ed., 390, 393; Swart *v.* Kimball, 43 Mich. 448; 5 N. W. Rep. 635; Buckrice *v.* People, 110 Ill. 29.

[4] Mack *v.* People, 82 N. Y. 235; Archer *v.* State, 106 Ind. 426; 7 N. E. Rep. 225.

[5] People *v.* Powell, 87 Cal. 348; 25 Pac. Rep. 481.

[6] Buckrice *v.* People, 110 Ill. 29.

[7] Campbell *v.* People, 109 Ill. 565; 50 Am. Rep. 621.

The court to which the action is sent obtains jurisdiction by a compliance with the statute authorizing the change and an order therefor by the proper court.[1] But the failure of the clerk of the court from which the change is taken to perform the ministerial duty of transferring the papers does not affect the jurisdiction of the court to which the change is taken.[2]

It is held, however, that the court from which the change is taken has jurisdiction until the change is perfected by the transmission of the papers, and may, during the term, change its order as to the county to which the case is to be sent.[3]

A criminal prosecution is an action at law, and where jurisdiction of all cases at law and in equity is given to one court by the constitution, such grant of jurisdiction includes criminal as well as civil cases at law, and the legislature can not take away such jurisdiction by vesting the same exclusively in some other court.[4] But in some of the states jurisdiction is by the constitution vested in one court, until otherwise provided for, in which case it is held that whenever provision is made, by statute, conferring such jurisdiction upon some other court, the same is otherwise provided for, and the court named in the constitution is thereby divested of all further jurisdiction in such cases.[5]

Jurisdiction given by the constitution can not be taken away by the legislature.[6] But if it is not made exclusive, the same jurisdiction may be conferred upon another court, thereby making the jurisdiction in the two courts concurrent.[6] If jurisdiction is conferred upon one court by the constitution, and is subsequently transferred by

[1] *Ante*, secs. 47, 48, 51; Goodhue *v.* People, 94 Ill. 37.

[2] Goodhue *v.* People, 94 Ill. 37.

[3] People *v.* Zane, 105 Ill. 662. See on this subject *ante*, secs. 46, 47, 48, 49, 51.

[4] *Ante*, secs. 24, 65, 66; Hankins *v.* The People, 106 Ill. 628, 637; Territory *v.* Flowers, 2 Mont. 531; Biscoe *v.* State, 68 Md. 294; 12 Atl. Rep. 25.

[5] Green *v.* Superior Court, 78 Cal. 556; 21 Pac. Rep. 307, 541.

[6] *Ante*, secs. 24, 66; State *v.* Butt, 25 Fla. 258; 5 Sou. Rep. 597.

statute to another court, and the latter is thereafter abolished, the jurisdiction returns to the former.[1]

Where, at the time of the adoption of a constitution which declares that all laws relating to courts shall be uniform, and which vests jurisdiction in criminal cases in a court of general and uniform jurisdiction throughout the state, a special statute is in existence conferring exclusive jurisdiction in such cases upon a municipal court of a city within the state, such statute is abrogated by the constitution, and such municipal court deprived of all further jurisdiction.[2] But the authority to vest inferior municipal courts with exclusive jurisdiction of minor offenses is sometimes given by the constitution, in which case such jurisdiction may be given in one or more cities in the state, and not in others, thereby rendering the jurisdiction of the court of general jurisdiction different in different counties.[3]

Where a court has jurisdiction over the offense charged, it may convict of a lesser offense included within it, although it would have no jurisdiction over the latter if charged. In such cases jurisdiction is determined by the charge made in the indictment, and not by the verdict.[4] But this can not be so where the offense actually proved or found by the jury to have been committed might have been embraced within or committed in and as a part of the perpetration of the offense charged, but is not included within it as a lesser degree of criminal offense. Thus it is held that although an assault and battery may be committed in the perpetration of a riot, the former is not included within the latter in the sense that a party charged with a riot could be convicted of an assault and battery.[5]

[1] Anderson *v.* Commonwealth, 3 S. W. Rep. 127.

[2] Hart *v.* The People, 89 Ill. 407.

[3] Green *v.* Superior Court, 78 Cal. 556; 21 Pac. Rep. 307, 541; Ex parte Wallingford, 60 Cal. 103.

[4] McLean *v.* State, 23 Fla. 281; 2 Sou. Rep. 5; Ex parte Donahue, 65 Cal. 474; 4 Pac. Rep. 449; People *v.* Holland, 59 Cal. 364; State *v.* Fesperman, 108 N. Car. 770; 13 S. E. Rep. 14; People *v.* Rose, 15 N.Y. Supl. 815.

[5] Ferguson *v.* People, 90 Ill. 510.

A court having jurisdiction of the offense may exceed its powers in the punishment inflicted. In such case, if the excessive punishment adjudged is separable from the one authorized by law, and also inflicted, the judgment is only void as to the excessive punishment. But where the judgment is a unit and a part of it is in excess of the jurisdiction of the court, the whole of it is void.[1]

The same act may constitute an offense against a state and the federal government, as in the case of counterfeiting, and the courts of both may have jurisdiction, one of the offense under the state statute and the other under the act of congress defining the offense.[2]

An appeal confers no jurisdiction upon the appellate court where the court below had no jurisdiction of the subject-matter.[3]

The mode in which prosecutions may be instituted is sometimes provided for and limited by constitutional provisions. For example, it is sometimes provided that prosecutions can not be commenced otherwise than by the action of a grand jury.[4] Under such a provision, a court can not acquire jurisdiction by the filing of an information or in any way other than by the presentment or indictment of a grand jury.[5] And violations of municipal ordinances, punishable by fine and imprisonment, are criminal offenses and within the rule.[6] But if there is no constitutional limitation upon the manner of commencing criminal prosecutions, it is within the control of the legislature, and it may provide for the making of the accusation in some other manner, as, for example, by examination and commitment by a

[1] Ex parte Kelly, 65 Cal. 154; 3 Pac. Rep. 673.

[2] People *v.* McDonnell, 80 Cal. 285; 22 Pac. Rep. 190; United States *v.* Arjona, 120 U. S. 479–488; 7 Sup. Ct. Rep. 628.

[3] *Ante*, sec. 21; Klaise *v.* State, 27 Wis. 462.

[4] Haskins *v.* State, 47 Ark. 243; 1 S. W. Rep. 242.

[5] Haskins *v.* State, 47 Ark. 243; 1 S. W. Rep. 242; State *v.* West, 42 Minn. 147; 43 N. W. Rep. 845.

[6] State *v.* West, 42 Minn. 147; 43 N. W. Rep. 845.

magistrate followed by an information by the proper prosecuting officer.[1] And such a mode of prosecution is not one without due process of law or in violation of the constitution of the United States.[2] But where provision is made for an examination before a magistrate, as a foundation for the filing of an information, such examination is absolutely necessary and can not be waived by the accused.[3] And an order of commitment by the examining magistrate is necessary to give the trial court jurisdiction.[4]

It has been held that where a defendant is committed for trial for one offense, the district attorney may, upon such a commitment, file his information and prosecute for any offense appearing from the evidence taken at the preliminary hearing.[5]

If this be so, the commitment by the magistrate would seem to be an idle ceremony. The duty of deciding what offense is shown by the evidence, is thus committed to the district attorney instead of the magistrate, and the accused may be imprisoned for the commission of an offense of which there is no proof, and held and prosecuted for an entirely different one. The reasoning by which this conclusion is reached is any thing but satisfactory, and seems to be directly opposed to the provisions of the statute.[6]

It is held also that the magistrate is not confined to

[1] Hurtado *v.* People of California, 110 U. S. 516; 4 Sup. Ct. Rep. 111, 292.

[2] Hurtado *v.* People of California, 110 U. S. 516; 4 Sup. Ct. Rep. 111, 292; Kalloch *v.* Superior Court, 56 Cal. 229.

[3] Ex parte Walsh, 39 Cal. 705; Kalloch *v.* Superior Court, 56 Cal. 229.

[4] People *v.* Thompson, 84 Cal. 598; 24 Pac. Rep. 384.

[5] People *v.* Lee Ah Chuck, 66 Cal. 662; 6 Pac. Rep. 859; People *v.* Vierra, 67 Cal. 231; 7 Pac. Rep. 640.

[6] See People *v.* Vierra, 67 Cal. 231, 232; 7 Pac. Rep. 640, where the provisions of the Penal Code of California on the subject are set out. The rule laid down has, however, become the settled law of the state by repeated decisions of the court. People *v.* Giancoli, 74 Cal. 642, 646; 16 Pac. Rep. 510; People *v.* Staples, 91 Cal. 23; 27 Pac. Rep. 523; Ex parte Nicholas, 91 Cal. 640; 28 Pac. Rep. 47. But see concurring opinion of Paterson, J., in People *v.* Parker, 91 Cal. 91, 94; 27 Pac. Rep. 537; and Hurtado *v.* People of California, 110 U. S. 516; 4 Sup. Ct. Rep. 111, 292.

the charge made before him, but may commit the accused for any offense shown by the evidence to have been committed.[1]

The district attorney is not given unlimited authority, however. He must file his information for the offense designated by the magistrate or one shown by the evidence to have been committed.[2]

Where the accused is given the election to be tried in one or the other of two courts, his election to be tried in one of them gives that court exclusive jurisdiction of the case.[3] And sometimes the demand by the accused for a trial by jury has the effect, under statutory provisions, to deprive one court of jurisdiction and transfer it to another.[4] Sometimes the jurisdiction of an offense depends upon whether or not it is of a high and aggravated character. For example, in cases of assault and battery, whether the offense is one of simple assault or one of so serious a nature as to render it "high and aggravated." In such cases, the indictment or information must charge the facts necessary to show that the offense is such as to bring it within the jurisdiction of the court.[5]

70. MARITIME JURISDICTION.—The question of maritime and admiralty jurisdiction arises most frequently in treating of the jurisdiction of the federal courts to which as a general rule, such jurisdiction belongs exclusively.[6] But, as the state courts are not wholly without jurisdiction in cases growing out of the navigation of vessels, it

[1] People *v.* Wheeler, 73 Cal. 252; 14 Pac. Rep. 796; People *v.* Staples, 91 Cal. 23; 27 Pac. Rep. 523.

[2] People *v.* Parker, 91 Cal. 91; 27 Pac. Rep. 537.

[3] Howell *v.* Commonwealth, 86 Va. 817; 11 S. E. Rep. 238.

[4] In re Gibson, 89 Ala. 174; 7 Sou. Rep. 833.

[5] State *v.* Grant, 34 S. Car. 109; 12 S. E. Rep. 1070.

[6] *Ante*, sec. 5; Rev. Stat. U. S., sec. 711; Meyer *v.* Tupper, 66 U. S. 522; Cowden *v.* Pacific Coast S. S. Co., 94 Cal. 470; 29 Pac. Rep. 873; Steamboat Josephine, 39 N. Y. 19; Crawford *v.* Bark Caroline Reed, 42 Cal. 469. But see Warner *v.* Steamer Uncle Sam, 9 Cal. 697, 710; Ord *v.* Steamer Uncle Sam, 13 Cal. 370; Taylor *v.* Steamer Columbus, 5 Cal. 268.

would seem to be proper to consider briefly the question of their jurisdiction, with the view, chiefly, of ascertaining to what extent the states may confer, and the state courts exercise, jurisdiction in such cases.[1]

This jurisdiction of the state courts is not, strictly speaking, admiralty jurisdiction. It is confined to interior navigation not upon tide waters or inland lakes and rivers where no commerce is carried on between different states or with a foreign nation. Over matters growing out of such interior navigation, the federal courts have no jurisdiction.[2] Claims against vessels, not maritime in their nature, are within the jurisdiction of state courts.[3]

The states may and frequently do provide by law for liens upon vessels in certain cases, but it does not follow that such liens must or can be enforced in the state courts. They are frequently enforced in the federal courts, and, if maritime contracts, the state courts can not enforce them.[4]

The extent to which the federal courts of admiralty jurisdiction may entertain jurisdiction of claims arising under state laws does not depend upon such statutes. Whether they are enforcible in the state courts, depends, of course, upon whether the jurisdiction falls within the exclusive jurisdiction of the federal courts.[5] And this depends, not upon the character of the parties, but upon the character of the contract.[6]

It is held, with reference to some of the state laws, pro-

[1] As to what courts exercise maritime jurisdiction, see *Ante*, sec. 5.

[2] Steamboat Orleans *v.* Phœbus, 11 Pet. 175; King *v.* Greenway, 71 N. Y. 413.

[3] Brookman *v.* Hamill, 43 N. Y. 554; 3 Am. Rep. 731; Sheppard *v.* Steele, 43 N. Y. 52; 3 Am. Rep. 660.

[4] Meyer *v.* Tupper, 66 U. S. 522; Peyroux *v.* Howard, 7 Pet. 324; The General Smith, 4 Wheat. 438; Rodd *v.* Heartt, 21 Wall. 558; The Oregon, 45 Fed. Rep. 62.

[5] Steamboat Josephine, 39 N. Y. 19; Brookman *v.* Hamill, 43 N. Y. 554; 3 Am. Rep. 731; Poole *v.* Kermit, 59 N. Y. 554; King *v.* Greenway, 71 N. Y. 413; Johnson *v.* Chicago and Pacific El. Co., 119 U. S. 388; 7 Sup. Ct. Rep. 254; Gindelve *v.* Corrigan, 129 Ill. 582; 22 N. E. Rep. 516; Crawford *v.* Bark Caroline Reed, 42 Cal. 469.

[6] McDonald *v.* Prioleau, 44 Fed. Rep. 769.

viding for such liens, that it is discretionary with the federal courts whether they will entertain jurisdiction to enforce them or not, and that this may be determined by the rules of the court.[1] And in the regulation of commerce, congress may provide for such liens.[2] But, so long as congress does not interpose to regulate the subject, the rights of material-men furnishing necessaries to a vessel in her home port may be regulated in each state by state legislation.[2] And a state may regulate fisheries in the navigable waters within its territory where there is no federal statute or treaty on the subject.[3] So it may impose proper police regulations affecting vessels navigating the waters of the state so long as such regulations do not conflict with congressional legislation.[4] But it can not enforce a maritime claim or contract in its own courts, except by common-law remedy.[5]

The states can not, by laws providing for liens, extend or enlarge the jurisdiction of the federal courts, nor, if the lien is one cognizable in the admiralty courts, can the courts decline to exercise jurisdiction because the enforcement of the lien is provided for and regulated by a state law.[6] Therefore, a state may provide for a lien upon a domestic vessel, and the federal courts have jurisdiction to enforce it, although the general maritime laws would give a lien only upon foreign vessels or upon a vessel in the port of a state to which she does not belong.[7] But a lien given by state laws for supplies furnished to or repairs made upon a vessel engaged in foreign commerce can not be enforced in the state courts, although such supplies were furnished or repairs made in her home port.[8]

[1] Meyer *v.* Tupper, 66 U. S. 522. [2] Rodd *v.* Heartt, 21 Wall. 558.

[3] Commonwealth *v.* Manchester, 152 Mass. 230; 25 N. E. Rep. 113; Manchester *v.* Commonwealth, 139 U. S. 240; 11 Sup. Ct. Rep. 559.

[4] Harmon *v.* City of Chicago, 110 Ill. 400; 51 Am. Rep. 698.

[5] Brookman *v.* Hamill, 43 N. Y. 554; 3 Am. Rep. 731; Poole *v.* Kermit, 59 N. Y. 554.

[6] Meyer *v.* Tupper, 66 U. S. 522.

[7] Peyroux *v.* Howard, 7 Pet. 324; The General Smith, 4 Wheat. 438; McDonald *v.* Prioleau, 44 Fed. Rep. 769.

[8] Poole *v.* Kermit, 59 N. Y. 554.

A state may provide for, and enforce through its own courts, liens upon vessels navigating the interior streams of the state and not engaged in foreign or interstate commerce.[1] So it may enforce, through its courts, liens for work and supplies in the construction of a vessel not yet launched, because contracts for such work and supplies are not maritime.[2] But a state law providing for such a lien could not extend the jurisdiction of the admiralty courts to a case where the lien grew out of a contract or other transaction upon the interior streams of the state, over which the federal courts have no jurisdiction, because it would not be a maritime contract or a transaction within the rules of the admiralty laws.[3]

The general rule of admiralty jurisdiction is that it is confined to tide waters, and does not extend to navigable streams above the ebb and flow of the tides.[4] But the jurisdiction of the federal courts is not so confined under the Constitution of the United States, as held by later decisions, but extends to the navigable lakes and rivers above the tides where commerce is carried on between different states or with a foreign nation.[5]

The laws of the United States reserve to the states the right to enforce, through their courts, any common-law remedy which the common law is competent to give in matters growing out of maritime transactions.[6] And the foundation of the cause of action is not material. It is the remedy and not the right that is reserved to the states.[7] The fact that the common-law remedy is aided by a lien

[1] King *v.* Greenway, 71 N. Y. 413.

[2] King *v.* Greenway, 71 N. Y. 413; Wilson *v.* Lawrence, 82 N. Y. 409.

[3] Peyroux *v.* Howard, 7 Pet. 324; Steamboat Orleans *v.* Phœbus, 11 Pet. 175.

[4] Peyroux *v.* Howard, 7 Pet. 324.

[5] The Genessee Chief, 12 How. 443; The Eagle *v.* Fraser, 8 Wall. 15.

[6] Rev. Stat. U. S., sec. 711; Cowden *v.* Pacific Coast S. S. Co., 94 Cal. 470; 29 Pac. Rep. 873; Chappell *v.* Bradshaw, 128 U. S. 132; 9 Sup. Ct. Rep. 40; Brookman *v.* Hamill, 43 N. Y. 554; 3 Am. Rep. 731; Dougan *v.* Champlain Trans. Co., 56 N. Y. 1.

[7] Dougan *v.* Champlain Trans. Co., 56 N. Y. 1.

provided for by a state law, does not affect the jurisdiction of the state courts.[1] Therefore it is held that a foreign attachment provided by a state law may be enforced against a vessel in aid of a common-law action *in personam* in a state court.[2]

71. IMPEACHMENT.—Jurisdiction of proceedings for the impeachment of public officers is usually vested in some political body. The Constitution of the United States provides for the removal from office, on impeachment, of the president, vice-president, and all civil officers of the United States.[3] And the sole power of impeachment is vested in the house of representatives.[4] But this clause of the constitution confers upon the house of representatives the power to prefer charges of impeachment and thereby institute the proceedings, and does not confer jurisdiction to try such charges. This jurisdiction is vested by the constitution in the senate.[5]

The jurisdiction, as to the punishment to be inflicted, is limited by the express terms of the constitution, and a conviction can not be had without the concurrence of two-thirds of the members present.[5] When the president of the United States is tried the chief justice of the supreme court is made a part of the court, and must preside.[5] In other cases the court is purely a political body possessing, for the time being, the limited jurisdiction expressly conferred upon it by the constitution.

The senate, in impeachment cases, acquires jurisdiction by charges or articles of impeachment being preferred by the house of representatives, without which it has no power to act. The impeachment of an officer does not affect the jurisdiction of the courts to try and convict him, under indictment, for the same offense for which he was impeached.[5]

[1] Johnson *v.* Chicago & Pac. El. Co., 119 U. S. 388; 7 Sup. Ct. Rep. 254; Gindele *v.* Corrigan, 129 Ill. 582; 22 N. E. Rep. 516.

[2] Taylor *v.* Carryl, 20 How. 583; Johnson *v.* Chicago & Pac. El. Co., 119 U. S. 388; 7 Sup. Ct. Rep. 254.

[3] Const. U. S., Art. II, sec. 4. [4] Const. U. S., Art. I, sec. 2.

[5] Art. I, sec. 3.

As to state officers, similar provisions are made by constitutional provision for their impeachment by the legislature. But in some of the states provision is made for the impeachment of certain officers before the courts upon information filed by the proper prosecuting officer. But a prior hearing and finding or report by a grand jury or some other designated body, is usually required as a foundation for the information. In such cases the filing of an information is not left to the discretion of the prosecuting officer. Without the finding or report required he has no authority to act, nor will an information filed without the finding or report required being made uphold the proceeding.[1] In the exercise of such jurisdiction a substantial compliance with the constitution or statute authorizing it, and providing the proceeding to be taken, is necessary.[1]

There is very little law to be found on the subject of impeachment, and jurisdiction in such cases has rarely been raised or considered. This is probably because proceedings of this kind have generally resulted in the acquittal of the officer charged.

72. CONTEMPTS.—This subject has received some attention in discussing the inherent powers of courts.[2] But it is believed that a fuller consideration of the questions of jurisdiction growing out of proceedings of this character is necessary, in this connection, without repeating what has been already said.

Jurisdiction in cases of contempt does not, in all cases, depend upon express law, and is sometimes exercised by the courts, in spite of statutory provisions forbidding or limiting its exercise. It belongs to the courts as a part of their inherent powers, of which they can not be deprived by the legislative branch of the government.[3] And

[1] State *v.* Savage, 89 Ala. 1; 7 Sou. Rep. 7. [2] *Ante*, sec. 27.

[3] *Ante*, sec. 27; Hawkins *v.* State, 125 Ind. 570; 25 N. E. Rep. 818; In re Shortridge, 34 Pac. Rep. 227; In re Terry, 128 U. S. 289; 9 Sup. Ct. Rep. 77; Cartwright's case, 114 Mass. 230, 238; Cooper *v.* People, 13 Col. 337, 373; 22 Pac. Rep. 790; Ex parte Robinson, 19 Wall. 505; People *v.* Wilson, 64 Ill. 195; 16 Am. Rep. 528; Clark *v.* People, 12 Am. Dec. 178,

the rule that the courts can not be deprived of the power to punish for contempt applies to constructive, or consequential, contempts, as well as to direct contempts.[1]

note; State *v.* Frew, 24 W. Va. 416; 49 Am. Rep. 257; Little *v.* State, 90 Ind. 338; 46 Am. Rep. 224.

[1] State *v.* Frew, 24 W. Va. 416, 455; 49 Am. Rep. 257.

"It is conceded here in the argument that it is not in the power of the legislature to take from courts the inherent power possessed by them to punish contempts in the face of the courts; but it is insisted that the legislature may at will deprive the courts of the power to punish summarily constructive contempts such as that described in the rule. At common law, as clearly appears in Dandridge's case, the power to punish for such constructive contempts was as much an inherent because a necessary power, as to punish for direct contempts; and as we have seen, this position is abundantly sustained by authority. Does not the reason for the existence of the power as much obtain in the one case as the other? If an attorney at the bar should charge the court in its presence with being bribed to decide the cause under argument against his client, no one would doubt for a moment the right of the court to summarily punish him for such contempt. Why? Not because he had interrupted the court in its dispatch of business; for there was no interruption in the hearing of the cause. The court would have the right to punish the offender because the language used was designed and calculated to destroy the confidence of the people in the court and to degrade the court in the opinion of the public and to corrupt the streams of justice. In such case the court would be wanting in respect for the people, whose servant it is, if it did not summarily punish the offender. There may not have been a half dozen persons in the court-room to hear the charge of corruption against the court, yet it would be not only right but the duty of the court to punish such a contempt. Is it not absurd to say, that if the same attorney had published the same charge in a newspaper printed in the town where the court was sitting which was read by thousands; aye, read in the court-room within view of the court it was designed to affect, he would not be guilty of a contempt of court, for which he should be summarily punished? If a suit for libel would be an ample vindication, as is stated by the judge, who delivered the opinion in Stuart *v.* The People, 3 Scam., in the one case, a slander suit would be in the other. Such a suggestion is disgusting to a man of honor. It will be a sorry day when the practice shall obtain among judges of the court of last resort, who hold the dearest interests of the people in their hands, where in their judicial capacity they may be grossly libeled to leave thier high positions and go before a jury in a libel suit, be subjected to the coarse criticism of defendant's counsel, and if they succeed in their suit, have it cast in their teeth, that they were influenced by sordid motives. Who would have any respect for a judge who would pursue such a course? Would he not under such circumstances deserve the contempt of every good citizen? Besides, what

But it is a power that is not unlimited or beyond the power of the legislature to control, limit, and regulate, within reasonable bounds.[1] And in most of the states, the power to punish for contempt, and the cases in which it may be exercised, are given and provided for by statute, including, generally, the cases in which the right would exist without such statutory authority.[2]

The power to punish for contempt is not confined to courts, but is allowed to legislative bodies, to a limited extent, and without such power being expressly granted by the constitution or statute.[3] But legislative bodies do not possess general power to punish for contempt, but only such powers as are expressly conferred by law and such incidental powers as are necessary to carry out and exercise its duties and functions.[4] Therefore, a witness can not be punished

right would he have individually to recover damages for a wrong committed against him in his judicial capacity, for an injury done the people in his person? In such cases the individual must always be separated from the judge. The court has no right to punish as for contempt one who libels an individual, who happens to be the judge; but it is a contempt of the court, as such, and an insult to the people represented by the court, which alone the *court can* punish as such. Scarcely less repulsive to all sense of judicial dignity is the suggestion that the judge should play the role of prosecuting witness in the trial of an indictment for libel. If that day shall ever come, when such shall be the only protection left to courts of justice against publications affecting their judicial integrity, none but the base and vicious can be expected to occupy judicial position." State *v.* Frew, 24 W. Va. 416, 455; 49 Am. Rep. 257.

[1] *Ante*, sec. 27; Hawkins *v.* State, 125 Ind. 570; 25 N. E. Rep. 818; In re Shortridge, 34 Pac. Rep. 227; Clark *v.* People, 12 Am. Dec. 179, note; State *v.* Galloway, 5 Cold. (Tenn.) 326; 98 Am. Dec. 404; In re Patterson, 99 N. Car. 407; 6 S. E. Rep. 643; Langdon *v.* Judges, 76 Mich. 358; 43 N. W. Rep. 310; Wyatt *v.* People, 17 Colo. 252; 28 Pac. Rep. 961; McCarthy *v.* State, 89 Tenn. 543; 15 S. W. Rep. 736; State *v.* McClaugherty, 33 W. Va. 250; 10 S. E. Rep. 407.

[2] Whittem *v.* State, 36 Ind. 196; Haskett *v.* State, 51 Ind. 176; People *v.* Wilson, 64 Ill. 195; 16 Am. Rep. 528; Langdon *v.* Judges, 76 Mich. 358; 43 N. W. Rep. 310.

[3] Cooley Const. Lim., 5 ed., 159, 160, 161; Ex parte Dalton, 44 Ohio St. 142; 5 N. E. Rep. 136; Burnham *v.* Morrissey, 14 Gray, 226; 74 Am. Dec. 676; People *v.* Webb, 5 N. Y. Supl. 855.

[4] Cooley Const. Lim., 5 ed., 161; Kilbourn *v.* Thomson, 103 U. S. 168; Burnham *v.* Morrissey, 14 Gray, 226; 74 Am. Dec. 676; Ex parte Dal-

for contempt for refusing to testify before a committee of a legislative body concerning matters foreign to any legislative measure or inquiry.[1] And the power to punish for contempt is open to review by the courts.[2]

As respects the congress of the United States, the power of one of its branches to punish others than its own members for contempt was recognized in an early case.[3] But this case has not been followed in later cases, and the power of the house of representatives to punish for contempts committed by others than its own members has been seriously questioned, but has been left an open question.[4] It is believed, however, that it is generally conceded that the attendance of witnesses to testify with reference to powers expressly conferred upon the two houses of congress, as, for example, in contests of elections, may be enforced by such means as would be open to a court of justice.[5] But there are cases which seem to hold that there is no power in a legislative body in this country to punish a witness, unless such power is expressly conferred by statute or the constitution, and that they derive no such power from the common law or from the precedents or practice in the English parliament.[6]

The jurisdiction in contempts depends, in a measure, upon the character of the contempt, whether direct or constructive or consequential. These two kinds of contempts have been defined.[7]

ton, 44 Ohio St. 142; 5 N. E. Rep. 136; People *v.* Webb, 5 N. Y. Supl. 855.

[1] Kilbourn *v.* Thomson, 103 U. S. 168; People *v.* Webb, 5 N. Y. Supl. 855.

[2] Kilbourn *v.* Thomson, 103 U. S. 168; Burnham *v.* Morrissey, 14 Gray, 226; 74 Am. Dec. 676.

[3] Anderson *v.* Dunn, 6 Wheat. 204, 218.

[4] Kilbourn *v.* Thomson, 103 U. S. 168, 196. See, however, Ex parte Dalton, 44 Ohio St. 142; 5 N. E. Rep. 136; People *v.* Keeler, 99 N. Y. 474; Keeler *v.* McDonald, 2 N. E. Rep. 615.

[5] Kilbourn *v.* Thomson, 103 U. S. 168, 190.

[6] People *v.* Keeler, 99 N. Y. 474; Keeler *v.* McDonald, 2 N. E. Rep. 615; People *v.* Webb, 5 N. Y. Supl. 855.

[7] *Ante*, sec. 27. See also In re Dill, 32 Kan. 668; 5 Pac. Rep. 39; And. Dic. of Law, 242; Whittem *v.* State, 36 Ind. 196; Murphy *v.* Wilson, 46

An act may constitute a contempt at common law, or it may be made so by express statutory provision. And, by statutes, in many of the states, provision is made for the punishment of what are known as civil contempts, being some act in disobedience of some judicial order entered for the benefit or advantage of another party to the proceeding.[1]

And although such statutes, or their enforcement, may aid in the collection of a debt, they do not authorize imprisonment for debt, and are not, therefore, void for that reason.[2] But if the order is for the imprisonment of the accused until a debt is paid, it is in legal effect an imprisonment for debt, and in violation of a constitutional provision prohibiting such imprisonment.[3]

The general rule is, that in case of direct contempts no affidavit or other showing is necessary to put the jurisdiction of the court in motion. The court may proceed, summarily, upon its own knowledge of the facts.[4] But in case of constructive contempts, of which the court can have no actual or personal knowledge, such a showing, in some form, is necessary, and the court has no jurisdiction to act without it.[5] Generally an affidavit is required in such cases, by statute,[6] and the affidavit charging the con-

Ind. 537; 4 Blk. Com. *283–288; In re Cary, 10 Fed. Rep. 622, 629, note; Ex parte Savin, 131 U. S. 267; 9 Sup. Ct. Rep. 699.

[1] Wyatt *v.* People, 17 Colo. 252; 28 Pac. Rep. 961; State *v.* Becht, 23 Minn. 411.

[2] State *v.* Becht, 23 Minn. 411; Ex parte Robertson, 27 Tex. App. 628; 11 S. W. Rep. 669; Lewis *v.* Lewis, 80 Ga. 706; 6 S. E. Rep. 918.

[3] Golson *v.* Holman, 28 S. Car. 53; 4 S. E. Rep. 811.

[4] In re Terry, 128 U. S. 289; 9 Sup. Ct. Rep. 77; Whittem *v.* State, 36 Ind. 196; Ex parte Wright, 65 Ind. 504; State *v.* Gibson, 33 W. Va. 97; 10 S. E. Rep. 58; Lowe *v.* State, 9 Ohio St. 337.

[5] Whittem *v.* State, 36 Ind. 196; McConnell *v.* State, 46 Ind. 298; Ex parte Wright, 65 Ind. 504; Albany City Bank *v.* Schermerhorn, 9 Paige, 372; 38 Am. Dec. 551; State *v.* Gibson, 33 W. Va. 97; 10 S. E. Rep. 58; Thomas *v.* People, 14 Colo. 254; 23 Pac. Rep. 326; State *v.* Kaiser, 20 Or. 50; 23 Pac. Rep. 964; Lowe *v.* State, 9 Ohio St. 337; In re Wood, 82 Mich. 75; 45 N. W. Rep. 1113.

[6] Thomas *v.* People, 14 Colo. 254; 23 Pac. Rep. 326; State *v.* Kaiser, 20 Or. 50; 23 Pac. Rep. 964; Lowe *v.* State, 9 Ohio St. 337; In re Wood, 82 Mich. 75; 45 N. W. Rep. 1113.

tempt must allege such facts as will constitute a contempt of the court.[1] Such a showing is usually required where the act complained of would not constitute a contempt at common law, but is made so by statutory enactment.

A showing by affidavit is not always necessary, however. The return of an officer is sometimes sufficient, as in case of the refusal of a witness to obey a subpena, and similar cases.[2] But a *prima facie* case must be made by some legitimate evidence, in a way that can be made a part of the record.[3]

A judgment of conviction of contempt will not be held void because the affidavit charging the offense was on information and belief.[4] And it has been held that the commitment is not based upon the affidavit but upon the evidence introduced on the return day, and that therefore the jurisdiction of the court does not depend upon the form of the affidavit, where the accused has been served with an order to show cause and given an opportunity to be heard in his defense.[5] But this does not accord with the rule on the subject, above stated, which is firmly supported by the authorities. A party should not be put to his defense except upon a sufficient accusation being presented.

As to the effect of a judgment in cases of contempt, whether conclusive, or open to review on appeal or otherwise, or not, the authorities are not agreed. In numerous cases a judgment in such cases is held to be final, unless it is otherwise provided by statute.[6]

But there are numerous other cases holding to the contrary.[7] And the latter seems to be the better rule. There

[1] McConnell *v.* State, 46 Ind. 298; Wyatt *v.* People, 17 Colo. 252; 28 Pac. Rep. 961.

[2] Wilson *v.* State, 57 Ind. 71; Ex parte Wright, 65 Ind. 504.

[3] Ex parte Wright, 65 Ind. 504.

[4] Ex parte Acock, 84 Cal. 50; 23 Pac. Rep. 1029.

[5] Golden Gate M. Co. *v.* Superior Court, 65 Cal. 187; 3 Pac. Rep. 628.

[6] Clark *v.* People. Breese (Ill.) 340; 12 Am. Dec. 177, 188, note; Williamson's Case, 26 Pa. St. 9; 67 Am. Dec. 374; Tyler *v.* Connelly, 65 Cal. 28; 2 Pac. Rep. 414; People *v.* Kelly, 24 N. Y. 74; New Orleans *v.* New York M. S. Co., 20 Wall. 387; State *v.* Thurmond, 37 Tex. 340.

[7] *Ante*, sec. 27; Myers *v.* State, 46 Ohio St. 473; 22 N. E. Rep. 43;

seems to be no good reason why an appeal should not be allowed in such cases, which often involve the liberty of a citizen which may be taken from him by a summary and hasty decision. This discrepancy in the decided cases results, in some instances, from different statutory provisions in the different states, but not always. In some of the states, such judgments are made final and conclusive by direct statutory enactment.[1] And some of the cases, holding that an appeal will lie in such proceedings, base their conclusion upon the ground that statutes providing for appeals in criminal cases embrace proceedings for contempts.[2] But a directly contrary view is taken in other cases.[3] Such judgments are, like all others, conclusive, as against a collateral attack.[4]

In some of the states a distinction is made between direct and constructive contempts with respect to the right to appeal, the right being allowed in the latter, but not in the former.[5]

Whether this rule of conclusiveness results from statutory provisions or not, it must be confined to cases where the court has jurisdiction over the subject-matter and the person. The jurisdiction of the court, or its general power to punish for contempt, is always open to inquiry as in other cases. And if, from the showing made, the court would have no power to punish the act done, as a contempt, under any circumstances, or the court has rendered a judgment not authorized by law, the proceeding is a nullity and will be so declared.[6] But whether

Whitten *v.* State, 36 Ind. 196; Wagner *v.* State, 68 Ind. 42; In re Pierce, 44 Wis. 411; Worden *v.* Searls, 121 U. S. 14; 7 Sup. Ct. Rep. 814; Walton *v.* Develing, 61 Ill. 201, 206.

[1] Cooper *v.* People, 13 Colo. 337, 373; 22 Pac. Rep. 790.

[2] Whittem *v.* State, 36 Ind. 196; Stuart *v.* People, 3 Scam. (Ill.) 395; Clark *v.* People, 12 Am. Dec. 186, note.

[3] Tyler *v.* Connolly, 65 Cal. 28; 2 Pac. Rep. 414.

[4] Ex parte Sternes, 77 Cal. 156; 19 Pac. Rep. 275.

[5] In re Deaton, 105 N. Car. 59; 11 S. E. Rep. 244.

[6] In re Shortridge, 34 Pac. Rep. 227; Cooper *v.* People, 13 Colo. 337, 373; 22 Pac. Rep. 790; Commonwealth *v.* Lecky, 26 Am. Dec. 41, note; State *v.* Galloway, 5 Cold. (Tenn.) 326; 98 Am. Dec. 404; In re Wood, 82 Mich. 75; 45 N. W. Rep. 1113; Gordon *v.* Buckles, 92 Cal. 481; 28 Pac. Rep. 490; Dewey *v.* Superior Court, 81 Cal. 64; 22 Pac. Rep. 333.

the acts complained of in the particular case are such as to constitute a contempt of court or not, is held not to be a jurisdictional question, and the fact that the court has erroneously held that they do constitute a contempt when they do not, and it has been so decided on appeal, does not render the action of the court void for want of jurisdiction.[1]

It is only necessary, under this rule, that such facts be stated as will call upon the court to determine, as matter of law, whether a contempt has been committed or not.[2] But the cases are not in harmony on this point. In some it is held that if it clearly appears from the record that the acts charged or proved did not constitute a contempt, the accused will be discharged on *habeas corpus* proceedings.[3]

With reference to legislative bodies, their action is generally held not to be conclusive, and the courts maintain the right to inquire into their power to punish for contempt. And this is placed upon the ground, in some of

[1] Fischer *v.* Langbein, 103 N. Y. 84, 8 N. E. Rep. 251.

[2] Fischer *v.* Langbein, 103 N. Y. 84; 8 N. E. Rep. 251; Rutherford *v.* Holmes, 66 N. Y. 368.

"The rule to be deduced from these authorities seems to be that when a court is called upon to adjudicate upon doubtful questions of law, or determine as to inferences to be drawn from circumstances reasonably susceptible of different interpretation or meanings, and calling for the exercise of the judicial function in their determination, its decision thereon does not render an order or process based upon it, although afterward vacated or set aside as erroneous or void, or subject the party procuring it to an action for damages thereby inflicted. Where the jurisdiction of the court is made to depend upon the existence of some fact of which there is an entire absence of proof, it has no authority to act in the premises; and if it, nevertheless, proceeds and entertains jurisdiction of the proceeding, all of its acts are void, and afford no justification to the parties instituting them as against parties injuriously affected thereby. But if the facts presented to the court call upon it for the exercise of judgment and reason, upon evidence which might in its consideration affect different minds differently, a judicial question is presented, which, however decided, does not render either party or the court making it liable for the consequences of its action." Fischer *v.* Langbein, 103 N. Y. 84; 8 N. E. Rep. 251, 254.

[3] People *v.* Kelly, 24 N. Y. 74; Easton *v.* State, 39 Ala. 551; 87 Am. Dec. 49; In re Shortridge, 34 Pac. Rep. 227.

the cases, that in this country legislative bodies are not courts, possessing the general power to punish for contempt, and that the courts are the final arbitrators in all cases affecting the liberty of the citizen.[1]

But the power of legislative bodies to punish their own members by expulsion, as well as to determine the election and qualification of their members, is generally held to be exclusive, and not subject to review by the courts, and expulsion may be a punishment for contempt, and therefore not subject to review or inquiry.[2]

In some of the states, power to punish for contempt is given by the constitution to legislative bodies in certain enumerated cases. And the power extended to other persons than their own members.[3] But no such grant of power exists in favor of the congress of the United States, except as to its own members.[4]

Where the offense is committed in the presence of or so near the court or judge as to obstruct the administration of justice, the court has jurisdiction to punish the offender without notice.[5] But the party charged must be given an opportunity to explain and defend.[6]

The facts recited in the order of commitment, or in the judgment, in such cases, are conclusive in case of a collateral attack.[7] So, in the absence of a showing in the record to the contrary, where the proceeding was before a court of general jurisdiction, the existence of jurisdictional facts will be presumed.[8] So it is held that the find-

[1] Kilbourn *v.* Thomson, 103 U. S. 168; Burnham *v.* Morrissey, 14 Gray, 226; 74 Am. Dec. 676.

[2] Cooley Const. Lim., 5 ed. 160.

[3] Speakership, etc., 15 Colo. 520; 25 Pac. Rep. 707.

[4] Kilbourn *v.* Thomson, 103 U. S. 168.

[5] In re Terry, 128 U. S. 289; 9 Sup. Ct. Rep. 77; Myers *v.* State, 46 Ohio St. 473; 22 N. E. Rep. 43.

[6] Ex parte Savin, 131 U. S. 267; 9 Sup. Ct. Rep. 699.

[7] In re Terry, 128 U. S. 289; 9 Sup. Ct. Rep. 77; Ex parte Acock, 84 Cal. 50; 23 Pac. Rep. 1029; Ex parte Sternes, 77 Cal. 156; 19 Pac. Rep. 275.

[8] State *v.* Becht, 23 Minn. 411; Ex parte Ah Men, 77 Cal. 198; 19 Pac. Rep. 380; Ex parte Sternes, 77 Cal. 156; 19 Pac. Rep. 275.

ings by the court of jurisdictional facts are conclusive in case of a collateral attack.[1]

A different rule prevails in case of a contempt committed out of the presence of the court. In such cases, an accusation is necessary, as we have shown above, and notice must be given the accused and an opportunity afforded him to defend. But the practice as to the manner in which the accusation shall be made and notice given is not uniform, nor is the form material, except the same be fixed by statute, so that the party be given a fair opportunity to confess, deny, or explain the charge.[2]

This may be done, usually, by an order to show cause, or by an attachment to arrest the accused.[3] But the proceedings required are usually provided for by statute. If the procedure is not provided for by statute, the court may adopt such mode of bringing the accused before the court, and of trying the contempt, as it deems proper, subject to the requirement that the person charged be given an opportunity for explanation and defense.[4] And where the practice is regulated by statute, strict conformity to its requirements may be waived by the person accused.[5]

[1] Ex parte Sternes, 77 Cal. 156; 19 Pac. Rep. 275; In re Deaton, 105 N. Car. 59; 11 S. E. Rep. 244.

[2] In re Cheeseman, 49 N. J. Law, 115; 6 Atl. Rep. 513.

[3] Albany City Bank *v.* Schermerhorn, 9 Paige, 372; 38 Am. Dec. 551.

[4] Ex parte Savin, 131 U. S. 267; 9 Sup. Ct. Rep. 699.

[5] In re Cheeseman, 49 N. J. Law, 115; 6 Atl. Rep. 513; Ex parte Bergman, 3 Wyo. 396; 26 Pac. Rep. 914.

"Counsel further contends that the proceedings of the court below should be annulled, because there does not seem to have been any affidavit of the facts as a foundation for the rule to show cause. This is not now a sufficient reason for reversal. No doubt, the ordinary course of practice in such cases in courts of law is that an affidavit of the facts should first be presented; then that a rule should be entered requiring the alleged offender to show cause why he should not be attached for contempt; then, if good cause be not shown, that an attachment should issue, and the accused, on being brought in, should be either held to bail, or committed to answer interrogatories; then that interrogatories should be exhibited and answered; and thereupon, according as his answers confess or deny his guilt, he should be punished or discharged. But the practice has not been uniform. Sometimes a rule to show cause

It has been held that the jurisdictional facts necessary to legalize a conviction for contempt in the superior courts of law are, *first*, that matters constituting a contempt should appear to the court to be true; and, *secondly*, that the party charged with contempt should have a fair opportunity to confess or deny those matters; and that outside of these facts, the steps to be taken are matters of practice only.[1]

The fact that the party accused may be proceeded against for the same offense, by indictment or information, does not affect the power of the court to punish for contempt.[2]

The power to punish for contempt is exclusive in the court against which the offense is committed.[3] And this applies to cases removed from state to federal courts. A federal court can not, after removal, punish for a contempt committed against the state court before removal.[4]

has been allowed without an affidavit, on a mere suggestion; sometimes an attachment has issued without a rule to show cause; sometimes punishment has been inflicted forthwith, on the offender's confession when brought in by writ, without interrogatories; and sometimes, as in McQuade *v.* Emmons, 38 N. J. Law, 397, the penalty has been imposed on the offender's admissions made under the original rule, without either writ or interrogatories. So that these various steps are manifestly not jurisdictional, except to the extent of laying before the court matters which constitute a contempt, and affording to the party accused a fair opportunity of denying or confessing their truth. In the present case, the appellant, on the return of the rule to show cause, filed his affidavit declaring the truth of all the matters alleged in the rule as the basis for its allowance; and, although the consideration of the cause was then adjourned from term to term, yet the appellant never intimated that an affidavit should have been presented before the rule was granted, or that he was entitled to have an attachment issue or interrogatories filed, or that the rule should be discharged for want thereof; and, even after sentence was pronounced, he obtained leave to amend his affidavit, but did not complain of any irregularity or illegality in the proceedings. Under these circumstances, the objection now made can not be sustained." In re Cheeseman, 49 N. J. Law, 115; 6 Atl. Rep. 513, 517.

[1] In re Cheeseman, 49 N. J. Law, 115; 6 Atl. Rep. 513.

[2] Ex parte Bergman, 3 Wyo. 396; 26 Pac. Rep. 914; Ex parte Savin, 131 U. S. 267; 9 Sup. Ct. Rep. 699.

[3] Kirk *v.* Milwaukee, etc., Co., 26 Fed. Rep. 501; Williamson's Case, 26 Pa. St. 9; 67 Am. Dec. 374; State *v.* Thurmond, 37 Tex. 340.

[4] Kirk *v.* Milwaukee, etc., Co., 26 Fed. Rep. 501.

The sole power of the federal courts to punish for contempt is derived from the statute.[1] But this would not be so if the statute did not expressly vest the courts with such power to punish for contempt as would belong to them inherently.[2] In other words, the statute is not necessary to the exercise of such power by the federal courts. But the statute is effective to limit the court to such jurisdiction as the courts would possess without it, and to such other acts as are enumerated in the statute, constituting indirect contempts. And this power, thus limited by act of congress, can not be extended or increased by state laws.[3] But whether the power of the supreme court of the United States, which derives its powers from the constitution, can be limited by statute, has been questioned.[4] And certainly its powers could not be so limited if the statute has the effect to take from it any jurisdiction conferred upon it by the constitution. But it does not seem to have that effect, as it appears to be broad enough to allow the exercise of any powers respecting contempts that could be exercised by virtue of the constitution.

It is held that the statute does not embrace territorial courts.[5]

The question whether inferior courts have inherent power to punish for contempt or not is one about which courts have differed. But at the present day it is settled by the great weight of authority that the power is not confined to superior courts.[6] But it has been held in

[1] Kirk *v.* Milwaukee, etc., Co., 26 Fed. Rep. 501; Ex parte Robinson, 19 Wall. 505; Ex parte Savin, 131 U. S. 267; 9 Sup. Ct. Rep. 699.

[2] Rev. Stat. U. S., sec. 725.

[3] Kirk *v.* Milwaukee, etc., Co., 26 Fed. Rep. 501.

[4] Ex parte Robinson, 19 Wall. 505.

[5] Territory *v.* Murray, 7 Mont. 251; 15 Pac. Rep. 145.

[6] *Ante*, sec. 27; Clark *v.* People, Breese (Ill.), 340; 12 Am. Dec. 177, 178, note; In re Monroe, 46 Fed. Rep. 52; In re Deaton, 105 N. Car. 59; 11 S. E. Rep. 244; State *v.* Newton, 62 Ind. 517; Swafford *v.* Berrong, 84 Ga. 65; 10 S. E. Rep. 593; Whitcomb's case, 120 Mass. 118; 21 Am. Rep. 502.

some of the cases that an inferior court has no power to punish except for a direct contempt.[1] In some the question is made to turn upon whether the court is one of record or not.[2] And in others it is held that they have no jurisdiction except such as is expressly conferred upon them by statute.[3] The latter proceed upon the theory, however, that, conceding that a justice of the peace had the inherent power, at common law, the same had been taken away by statute except in the cases enumerated in the statute. But this is equivalent to holding that no such inherent power exists in such courts; for, if it does exist, it is not within the power of the legislature to take it away entirely, although its exercise may be regulated, as we have seen. The case cited in which this distinction is made is not in line with the great weight of authority on the subject, certainly, and the decision was rendered by a divided court.

So far as relates to justices of the peace, the discrepancy in the decisions results very largely, it is believed, from the difference in the general powers and functions of such officer at common law and under the codes and statutes of the states in this country. At common law the power to punish for contempt was denied to justices of the peace. But then justices of the peace were regarded and treated as ministerial and not judicial officers.[4] At the present day, in most of the states, their duties are materially different in most, if not all, of the states. They exercise the functions and duties of a court, and in most of the states are held to be courts of record.[5]

Except in case of legislative bodies, the power to punish for contempt belongs to courts and judges alone.[6] The

[1] *Ante*, sec. 27; Clark *v.* People, 12 Am. Dec. 181, note.

[2] *Ante*, secs. 6, 27; Rhinehart *v.* Lance, 43 N. J. Law, 311; 39 Am. Rep. 592.

[3] Rutherford *v.* Holmes, 66 N. Y. 368; Watson *v.* Nelson, 69 N. Y. 536; Albright *v.* Lapp, 26 Pa. St. 99; 67 Am. Dec. 402.

[4] In re Mason, 43 Fed. Rep. 510, 515; Matter of Kerrigan, 33 N. J. Law, 344; Rhinehart *v.* Lance, 43 N. J. Law, 311; 39 Am. Rep. 592.

[5] *Ante*, secs. 6, 7; Whitcomb's case. 120 Mass. 118; 21 Am. Rep. 502.

[6] Langenberg *v.* Decker, 131 Ind. 471; 31 N. E. Rep. 190; In re Mason, 43 Fed. Rep. 510; Burtt *v.* Pyle, 89 Ind. 398; Matter of Kerrigan, 33 N. J. Law, 344.

power can not be conferred by the legislature upon other than judicial officers or bodies.[1]

It is held, however, that under a constitution which declares that the judicial power is vested in such tribunals as are created by the constitution, and such other inferior courts as are or may be established by law, and such persons as are or may be specially invested with powers of a judicial nature, where the charter of a town constituted its town council a court with power to punish offenders against the laws of the town, such town council had power to punish for contempt.[2] But the general rule is that a town council or common council of a city, has no power to punish for contempt.[3]

As to the power of notaries public, and like officers, authorized to take depositions, to punish a witness for contempt in refusing to obey subpenas issued by them, the authorities are not agreed.[4] This depends upon the question, whether such officers so far represent the court as to constitute them judicial officers vested with such power. Independent of statute conferring such power upon them, it is pretty well settled that they do not possess it.[5] But in some of the states the power is expressly conferred by statute, and has been upheld.[6] Whether such power can lawfully be conferred upon him by statute, is at least questionable. It is believed, however, that it may properly be conferred, at least so far as to authorize such officer to enforce obedience to a subpena to procure a deposition that he is authorized to take.

It is apparent from the later decisions on the subject that the power to punish has been greatly extended, as respects the courts and tribunals which may exercise the

[1] Langenberg *v.* Decker, 131 Ind. 471; 31 N. E. Rep. 190; Whitcomb's case, 120 Mass. 118; 21 Am. Rep. 502.

[2] Swafford *v.* Berrong, 84 Ga. 65; 10 S. E. Rep. 593.

[3] Whitcomb's case, 120 Mass. 118; 21 Am. Rep. 501.

[4] Whitcomb's Case, 120 Mass. 118; 21 Am. Rep. 502; Lezinsky *v.* Superior Court, 72 Cal. 510; 14 Pac. Rep. 104.

[5] Ex parte Mallinkrodt, 20 Mo. 493.

[6] In re Abeles, 12 Kan. 451; Ex parte Mallinkrodt, 20 Mo. 493; Ex parte McKee, 18 Mo. 599.

power, and has, as a rule, been recognized in all courts and tribunals exercising judicial functions, no matter what their grade or the limitations placed upon their jurisdiction.

The fact that the court has jurisdiction of the case in which the contempt is charged to have been committed, does not necessarily give it jurisdiction in the contempt proceedings. Its jurisdiction depends upon the facts alleged or proved, or the facts known to the court by reason of the alleged offense having been committed in its presence, which may or may not be such as to give the court jurisdiction to punish.[1]

To this extent the contempt proceedings must be treated as distinct from the original action.[2]

There is a difference, however, between what may be denominated criminal contempts and such as are civil in their nature and enforced in whole, or in part, for the protection or benefit of a party to the action; or, in other words, to enforce a civil remedy.[3]

As to the former they are essentially criminal actions to be prosecuted in the name of the state or of the United States, as the case may be;[4] but not criminal cases within the meaning of constitutional provisions guaranteeing the right of trial by jury and similar provisions.[5]

It is held that where the court has a law and equity side and the suit is in chancery, the contempt proceeding growing out of it must, after the attachment or rule to show cause is returned, be placed upon the law docket,

[1] Rutherford *v.* Holmes, 66 N. Y. 368.

[2] In re Pierce, 44 Wis. 411, 420; Williamson's case, 26 Pa. St. 9; 67 Am. Dec. 374; Worden *v.* Searls, 121 U. S. 14; 7 Sup. Ct. Rep. 814; State *v.* Irwin, 30 W. Va. 404; 4 S. E. Rep. 413; New Orleans *v.* New York M. S. Co., 20 Wall. 387.

[3] State *v.* Earl, 41 Ind. 464; In re Pierce, 44 Wis. 411, 422; State *v.* Becht, 23 Minn. 411; People *v.* Court of Oyer and Terminer, 101 N. Y. 447; 4 N. E. Rep. 259; Ex parte Robertson, 27 Tex. App. 628; 11 S. W. Rep. 669; Langdon *v.* Judges, 76 Mich. 358; 43 N. W. Rep. 310.

[4] Whittem *v.* State, 36 Ind. 196; State *v.* Irwin, 30 W. Va. 404; 4 S. E. Rep. 413; Fischer *v.* Hays, 6 Fed. Rep. 63.

[5] State *v.* Becht, 23 Minn. 411; Wyatt *v.* People, 17 Colo. 252; 28 Pac. Rep. 961; Garrigus *v.* State, 93 Ind. 239.

and that the chancery side of the court can have no jurisdiction over it.[1] But in some of the states, it is held to be a part of the original case and not a separate proceeding.[2]

The want of jurisdiction of the court to try the original action, or make the order which is alleged to have been violated, may affect the jurisdiction of the court in the contempt proceeding very materially. If the alleged contempt consists in the failure to obey an order of the court, or other violation of it, and the court has no jurisdiction to make the order alleged to have been violated, there can be no power to punish for the alleged contempt, because none has been committed.[3] And where the alleged contempt consists in disobeying or violating the process of the court, such process must be legal or there can be no contempt.[4]

In case of constructive contempts, a defendant may in a court of law purge himself of the contempt by a sworn denial of the facts alleged against him, and in such case no further proceedings against him can be had.[5] A different rule prevails in chancery.[6]

It is the policy of the courts not to extend the proceeding for contempt to cases not coming within the established rules as to what shall constitute such contempts.[7]

A court can only punish for a violation of its own process. Therefore it is held that a refusal to obey a subpena issued by a notary public for the taking of a deposition can not be punished as a contempt of the court in which the action in which the deposition is to be taken is pending.[8] But provision is made in some of the states by which the notary, or other officer taking the deposition,

[1] State *v.* Irwin, 30 W. Va. 404; 4 S. E. Rep. 413.

[2] Ex parte Ah Men, 77 Cal. 198; 19 Pac. Rep. 380.

[3] Walton *v.* Develing, 61 Ill. 201; Piper *v.* Pearson, 2 Gray, 120; 61 Am. Dec. 438, 442; Ex parte Brown, 97 Cal. 83; 31 Pac. Rep. 840.

[4] In re Monroe, 46 Fed. Rep. 52.

[5] Burke *v.* State, 47 Ind. 528; State *v.* Earl, 41 Ind. 464; 4 Blk. Com. *287.

[6] Burke *v.* State, 47 Ind. 528; 4 Blk. Com. *287.

[7] Haskett *v.* State, 51 Ind. 176.

[8] Lezinsky *v.* Superior Court, 72 Cal. 510; 14 Pac. Rep. 104.

may apply to the court for an order requiring the witness to obey his subpena, and if such order is made, a failure to comply with it may be punished as a contempt.

Where provision is made authorizing the court to strike out the pleading of a party for a failure to appear and testify, it must appear that the party was duly served with process issued by some proper court or officer.[1]

It is held that a court must, where the offense is committed in the presence of the court, proceed to punish without delay, or it will lose jurisdiction to punish at all.[2]

The rendition of final judgment terminates the jurisdiction of the court, as in other cases, except to enforce the judgment.[3]

73. DIVORCE.—In the early history of England divorces were granted by act of Parliament.[4] And the right of legislative bodies to grant divorces, in the absence of any constitutional provision against it, has been recognized and upheld in this country.[5] But the power to determine whether a divorce should be granted or not is essentially judicial in its nature and should be committed to the courts alone.[6] And so it has been, with very few exceptions, in the different states.[7] And where divorces by legislative bodies have been upheld the exercise of the power has been regarded as judicial in its nature.[8]

[1] Bish *v.* Beatty, 111 Ind. 403; 12 N. E. Rep. 523; White *v.* Morgan, 119 Ind. 338; 21 N. E. Rep. 968.

[2] In re Foote, 76 Cal. 543; 18 Pac. Rep. 678.

[3] Barry *v.* Superior Court, 91 Cal. 486; 27 Pac. Rep. 763.

[4] Sharon *v.* Sharon, 67 Cal. 185, 190; 7 Pac. Rep. 456, 635; 8 Pac. Rep. 709; Maynard *v.* Hill, 125 U. S. 190; 8 Sup. Ct. Rep. 723; 1 Bishop Mar. & Div., sec. 662.

[5] Doughty *v.* Doughty, 28 N. J. Eq. 581, 584; Maynard *v.* Hill, 125 U. S. 190; 8 Sup. Ct. Rep. 723; Jones *v.* Jones, 11 Sou. Rep. 11; Cooley Const. Lim. *p. 109; 1 Bishop Mar. & Div., sec. 664.

[6] Maynard *v.* Hill, 125 U. S. 190; 8 Sup. Ct. Rep. 723; Jones *v.* Jones, 11 Sou. Rep. 11; Cooley Const. Lim. *p. 109; In re Higbee, 4 Utah, 19: 5 Pac. Rep. 693; Sparhawk *v.* Sparhawk, 116 Mass. 315.

[7] Cooley Const. Lim. *p. 110; 1 Bishop Mar. & Div., sec. 680.

[8] In re Higbee, 4 Utah, 19; 5 Pac. Rep. 693; Jones *v.* Jones, 12 Pa. St. 350; 51 Am. Dec. 611.

A special statute authorizing a court to grant a divorce between individuals named, where the jurisdiction has been by the general law committed to the courts, and where under such general law a divorce could not be decreed, is unconstitutional.[1] So a statute providing that divorces from bed and board, theretofore granted, should be deemed and taken to be and have the force and effect of absolute divorces, was held to be unconstitutional and void.[2]

In England the jurisdiction was formerly vested in the ecclesiastical courts.[3] But at the present time it is committed by statute to the supreme court, and is exercised by the probate, divorce, and admiralty divisions of that court.[4]

In this country the jurisdiction is given to different courts in the different states. And the jurisdiction of the ecclesiastical courts in matters of divorce, although a part of the common law of that country, was not transmitted to the ordinary law courts of this country.[3] But when a court is vested with such jurisdiction it is entitled, and it is its duty, to exercise it according to the general principles of the common law on the subject, and the practice of the English courts, so far as they are suited to our condition and the general spirit of our laws, or are modified by statute.[5]

It is generally held that the jurisdiction is wholly statutory, and that without some statute authorizing it it can not be exercised.[6] And that the grant to a court of common law and equity jurisdiction does not confer jurisdic-

[1] Simonds *v.* Simonds, 103 Mass. 572; 4 Am. Rep. 576; Jones *v.* Jones, 11 Sou. Rep. 11. See also Sparhawk *v.* Sparhawk, 116 Mass. 315.

[2] Sparhawk *v.* Sparhawk, 116 Mass. 315.

[3] Le Barron *v.* Le Barron, 35 Vt. 364.

[4] *Ante*, sec. 3.

[5] Le Barron *v.* Le Barron, 35 Vt. 364; Mangels *v.* Mangels, 6 Mo. App. 481.

[6] Hopkins *v.* Hopkins, 39 Wis. 167; Cook *v.* Cook, 56 Wis. 195; 14 N. W. Rep. 33; Birkby *v.* Solomons, 15 Ill. 120; Le Barron *v.* Le Barron, 35 Vt. 364.

tion in divorce cases.[1] There are cases that hold the jurisdiction to be equitable and that it is included in a general grant of jurisdiction in equity cases.[2] But while there are matters connected with and incidental to the granting of divorces that are equitable,[3] the mere power to grant a divorce certainly does not belong to the general jurisdiction of a court of chancery.[4] Such jurisdiction is conferred upon courts of chancery by statute in some of the states, but it is none the less statutory jurisdiction.[5]

It is held that an action for divorce is a civil proceeding under the code, and that a grant of jurisdiction "in all civil cases, both at law and in equity," confers jurisdiction in divorce cases.[6]

The rules affecting jurisdiction in this class of cases are peculiar. The jurisdiction includes the granting of divorces, the allowance of alimony, the determination, generally, of the property rights of the parties, and the custody and maintenance of children. The three latter are incidental to the jurisdiction to grant the divorce.[7] But they are not necessarily dependent upon it. Jurisdiction as to these may exist independently of the pendency of an action for divorce, or the power to exercise jurisdiction in divorce cases.[8] This is not so, however, in all of the states. In some it is held that, under their statutes, a claim for alimony is not the subject-matter of a separate suit, but is only auxiliary to, or an incident of, an action for a divorce.[9]

[1] Kenyon *v.* Kenyon, 24 Pac. Rep. 829.

[2] Sharon *v.* Sharon, 67 Cal. 185; 7 Pac. Rep. 456, 635; 8 Pac. Rep. 709; Lyons *v.* Lyons, 18 Cal. 448.

[3] Laughery *v.* Laughery, 15 Ohio, 404.

[4] Mangels *v.* Mangels, 6 Mo. App. 481, 484.

[5] Bascom *v.* Bascom, 7 Ohio (part 2), 126; Laughery *v.* Laughery, 15 Ohio, 404.

[6] Ellis *v.* Hatfield, 20 Ind. 101.

[7] Mott *v.* Mott, 82 Cal. 413; 22 Pac. Rep. 1140.

[8] Galland *v.* Galland, 38 Cal. 265; Poole *v.* Wilbur, 95 Cal. 339, 342; 30 Pac. Rep. 548; Woods *v.* Waddle, 44 Ohio St. 449; 8 N. E. Rep. 297; Crugom *v.* Crugom, 64 Wis. 253; 25 N. W. Rep. 5.

[9] Damon *v.* Damon, 28 Wis. 510; Cook *v.* Cook, 56 Wis. 195; 14 N. W. Rep. 33.

In order to authorize the court to render a decree affecting the property of the parties, an issue with reference to it must be presented by the pleadings.[1]

The means of acquiring jurisdiction and the power to exercise it is different in the divorce proceeding proper and the matters above referred to as incidental to such proceedings, and the court may have jurisdiction to determine the question of divorce, and be wholly without jurisdiction to deal with these incidental matters.[2] This grows out of the difference in the nature of the remedies to be administered in each.

The power to grant divorces is one that affects the *status* of the parties merely; the action is not personal, but is the same in legal effect as an action *in rem*.[3] Although it has been held that, for some purposes, it is an action upon contract.[4] But this decision, holding that an action for divorce is one upon contract, is not in harmony with the general rule on the subject.[5] Personal service upon the defendant is not necessary, and where such defendant is a non-resident, jurisdiction may be obtained by publication, or by service out of the state, which is the same in legal effect.[6] But it is otherwise with reference to the granting of alimony. The remedy here is personal, and a decree or judgment against a non-resident defendant for alimony can only be granted upon personal service, or an appearance, or other waiver of service.[7] But a state may authorize judgments for alimony against its

[1] Remmington *v.* Superior Court, 69 Cal. 633; 11 Pac. Rep. 252.

[2] Cooley Const. Lim., * pp. 405, 406.

[3] Roth *v.* Roth, 104 Ill. 35; 44 Am. Rep. 81; Ellison *v.* Martin, 53 Mo. 575; In re Newman, 75 Cal. 213; 16 Pac. Rep. 887.

[4] Mott *v.* Mott, 82 Cal. 413; 22 Pac. Rep. 1140.

[5] Adams *v.* Palmer, 51 Me. 481; Wade *v.* Kalbfleisch, 58 N. Y. 282; 17 Am. Rep. 250; Noel *v.* Ewing, 9 Ind. 37; Maynard *v.* Hill, 125 U. S. 190; 8 Sup. Ct. Rep. 723; 1 Bishop Mar. & Div., sec. 667.

[6] Pennoyer *v.* Neff, 95 U. S. 714, 733; Gould *v.* Crow, 57 Mo. 200; Ellison *v.* Martin, 53 Mo. 575; Burlen *v.* Shannon, 115 Mass. 438; Cooley Const. Lim., * p. 405.

[7] Prosser *v.* Warner, 47 Vt. 667; 19 Am. Rep. 132; Beard *v.* Beard, 21 Ind. 321; *ante*, sec. 13, p. 42; secs. 14, 32, 33, 38; Pennoyer *v.* Neff, 95 U. S. 714; Ellison *v.* Martin, 53 Mo. 575; Cooley Const. Lim., * p. 406.

own citizens upon constructive notice, where there is no constitutional provision against it.[1]

Each of the states has the power to determine the *status* of its citizens, and upon what service, and upon what conditions, divorces may be granted as between them.[2] The law of the domicile controls, with respect to the jurisdiction of the court.[3] And decrees granted, as between its own residents, are respected in other states, both because of the provision of the constitution of the United States that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state,"[4] and because of the general principle of comity between states and nations.[5]

In some of the states it is so expressly provided by statute.[6] The same rule obtains with respect to the judgments of courts of foreign countries.[7] And judgments are enforced, generally, where the plaintiff is a resident of the state

[1] *Ante*, secs. 13, 14, 32, 33; Beard *v.* Beard, 21 Ind. 321.

[2] Hubbell *v.* Hubbell, 3 Wis. 662; 62 Am. Dec. 702; Cook *v.* Cook, 56 Wis. 195; 14 N. W. Rep. 33; Cox *v.* Cox, 19 Ohio St. 502, 510; 2 Am. Rep. 415; Prosser *v.* Warner, 47 Vt. 667; 19 Am. Rep. 132; Kinnier *v.* Kinnier, 45 N. Y. 535; 6 Am. Rep. 132; Doughty *v.* Doughty, 28 N. J. Eq. 581, 584; Beard *v.* Beard, 21 Ind. 321; Strader *v.* Graham, 10 How. 82, 93; Hunt *v.* Hunt, 72 N. Y. 217; 28 Am. Rep. 129; Sewall *v.* Sewall, 122 Mass. 156; 23 Am. Rep. 299; Gregory *v.* Gregory, 78 Me. 187; 3 Atl. Rep. 280; 57 Am. Rep. 792; Butler *v.* Washington; 12 Sou. Rep. 356; Cooley Const. Lim., * pp. 400–405; 2 Bishop Mar. & Div. 137.

[3] Tolen *v.* Tolen, 2 Blkf. (Ind.) 407; 21 Am. Dec. 743; Hood *v.* State, 56 Ind. 263, 268; 26 Am. Rep. 21; Kinnier *v.* Kinnier, 45 N. Y. 535; 6 Am. Rep. 132; Gregory *v.* Gregory, 78 Me. 187; 3 Atl. Rep. 280; 57 Am. Rep. 792; Thomson *v.* Thomson, 91 Ala. 591; 8 Sou. Rep. 419; Butler *v.* Washington, 12 Sou. Rep. 356; Cooley Const. Lim., * pp. 400, 401; 2 Bishop Mar. & Div., sec. 138.

[4] Const. U. S., Art. IV, sec. 1; *ante*, sec. 23, p. 127; Gould *v.* Crow, 57 Mo. 200; Wakefield *v.* Ives, 35 Ia. 238; Gregory *v.* Gregory, 78 Me. 187; 3 Atl. Rep. 280, 282, note; 57 Am. Rep. 792; Reed *v.* Reed, 52 Mich. 117; 17 N. W. Rep. 720.

[5] Hubbell *v.* Hubbell, 3 Wis. 662; 62 Am. Dec. 702; Cox *v.* Cox, 19 Ohio St. 502, 510; 2 Am. Rep. 415; Van Orsdal *v.* Van Orsdal, 67 Ia. 35; 24 N. W. Rep. 579; Tolen *v.* Tolen, 2 Blkf. (Ind.) 407; 21 Am. Dec. 743; Smith *v.* Smith, 10 Sou. Rep. 248.

[6] Burlen *v.* Shannon, 115 Mass. 438.

[7] Roth *v.* Roth, 104 Ill. 35; 44 Am. Rep. 81.

in which the divorce is granted and the defendant is a non-resident, where, by the statute of the state, the residence of the plaintiff gives jurisdiction.[1] But this is not universally so. In some of the states a decree of divorce granted against one of their citizens by a court of another state, upon constructive notice, is held to be a nullity, in the former, although valid by the law of the state in which the decree was rendered.[2]

And in the states in which this doctrine prevails an actual service out of the state has no greater effect than one by publication, and the decree is alike invalid in either case.[3] And this doctrine has been extended to cases where the defendant constructively served was not domiciled in the state in which the judgment was brought in question, but in a foreign country.[4]

In some of the states jurisdiction to grant a divorce to a resident, where a divorce has been granted his or her consort in another state, is given by statute.[5] In other

[1] Cox *v.* Cox, 19 Ohio St. 502, 510; 2 Am. Rep. 415; Burlen *v.* Shannon, 115 Mass. 438; Van Orsdal *v.* Van Orsdal, 67 Ia. 35; 24 N. W. Rep. 579; Wakefield *v.* Ives, 35 Ia. 238; Shafer *v.* Bushnell, 24 Wis. 372; Thomson *v.* Thomson, 91 Ala. 591; 8 Sou. Rep. 419; Loker *v.* Gerald, 31 N. E. Rep. 709; Smith *v.* Smith, 10 Sou. Rep. 248.

[2] Prosser *v.* Warner, 47 Vt. 667; 19 Am. Rep. 132; People *v.* Baker, 76 N. Y. 78; 32 Am. Rep. 274; Doughty *v.* Doughty, 28 N. J. Eq. 581; Flower *v.* Flower, 42 N. J. Eq. 152; 7 Atl. Rep. 669; Gregory *v.* Gregory, 78 Me. 187; 3 Atl. Rep. 280, 282, note; 57 Am. Rep. 792; De Meli *v.* De Meli, 120 N. Y. 485; 24 N. E. Rep. 996; In re House's Estate, 14 N. Y. Supl. 275; Munson *v.* Munson, 14 N. Y. Supl. 692; Williams *v.* Williams, 130 N. Y. 193; 29 N. E. Rep. 98.

[3] O'Dea *v.* O'Dea, 101 N. Y. 23; 4 N. E. Rep. 110; Williams *v.* Williams, 130 N. Y. 193; 29 N. E. Rep. 98.

[4] O'Dea *v.* O'Dea, 101 N. Y. 23; 4 N. E. Rep. 110. But see the dissenting opinion in this case.

[5] Van Inwagen *v.* Van Inwagen, 86 Mich. 333; 49 N. W. Rep. 154. The doctrine that a judgment obtained in another state against a non-resident upon constructive notice is a nullity has found its strongest support in New York, where the courts have gone to the fullest extent in repudiating the decrees of its sister states under such circumstances. But these cases are not in line with the decisions in other states, they are opposed to well settled principles of law that should hold the judgments of the courts of other states as binding as those of their own courts, and are unsupported by reasons that should have weight as

cases a kind of middle ground is taken, and it is held that as to the resident plaintiff the decree is binding, fixes his *status* and permits his second marriage, but that the decree has no extra territorial effect, does not affect the non-resi-

against the well settled principles strongly upheld in other states, and which are maintained by its own courts in cases other than proceedings for divorce. So apparent has this become that the doctrine may fairly be said to be upheld, at this time, only because it was so decided in the earlier cases and has become the settled law and policy of the state. And while submitting to it, as now firmly settled, some of the judges of that state have not hesitated to say that their reason revolts against it.

Thus in Davis *v.* Davis, 22 N. Y. Supl. 191, 192, Prior, J., says:

"As the marriage purporting to be dissolved was not celebrated in Massachusetts, as the defendant in the divorce suit was not domiciled in that commonwealth, nor was served with process there, nor appeared in the action, it results that, by the law of New York, the judgment against her is of no effect; that she is still the wife of the defendant; and that, by necessary consequence, his marriage with this plaintiff is a nullity. Mellen *v.* Mellen, 10 Abb. N. C. 329; O'Dea *v.* O'Dea, 101 N. Y. 23; 4 N. E. Rep. 110; Jones *v.* Jones, 108 N. Y. 415; 15 N. E. Rep. 707; Williams *v.* Williams, 130 N. Y. 193; 29 N. E. Rep. 98; De Meli *v.* De Meli, 120 N. Y. 485; 24 N. E. Rep. 996; People *v.* Baker, 76 N. Y. 78. To this conclusion I am compelled, but I am not forbidden to say, that my reason revolts against it. By the laws of Massachusetts, its court had jurisdiction of the defendant in the divorce suit, and the decree of divorce is valid and conclusive. By virtue of the supreme law of the nation, 'a decree in divorce, valid and effectual by the laws of the state where obtained, is valid and effectual in all other states' (Cheever *v.* Wilson, 9 Wall. 109); and yet I am to declare this Massachusetts judgment a nullity. And why? Because the jurisdiction of the Massachusetts court rests solely on a constructive service of process by publication; and by the law of New York such service is of no avail. But such constructive service of process is the only foundation of the jurisdiction of this court in the present case; yet, by the law of New York, such service gives jurisdiction to its court, and the judgment I am to render is not only valid, but of so transcendent an efficacy as to impeach the records and cancel the judicial proceedings of another state. In reason, such service of process should be sufficient in both states or in neither.

"Equally anomalous will be the effect of the judgment of this court on the relation and rights of the parties. In Massachusetts, not the former spouse, but this plaintiff, is the lawful wife of the defendant; while in New York the former spouse is still the wife of the defendant, and his connection with the plaintiff a crime. Indeed, relying on the nullity of the Massachusetts decree, the former wife has instituted here an action for divorce from the defendant, on the allegation that his mar-

dent defendant, and permits him or her to maintain an action for divorce and to recover alimony, and to determine the property rights of the parties in the state of his or her domicile.[1]

In still others the decree is held to be valid and binding in another state, upon the non-resident defendant as well as the resident plaintiff, so far as it affects the mere *status* of the parties, but that it can not affect the rights of the parties as to property situate in another state or a claim for alimony.[2] But it is generally held that where the party appeared and made defense, the decree is binding, not only as to the *status* of the parties, but that it has the effect to put an end to all obligations of either party to the other, and to any right which either has acquired by the marriage, in the other's property, whether situated within the state or not, unless the court, having the authority, otherwise orders or decrees.[3] And this is held to be so where the notice is constructive and there has been no appearance.[4] Why this should not be the effect of a decree so obtained, as well as in case of personal service or appearance, has never been satisfactorily explained in any of the cases holding to the contrary. If the decree is valid, one of its effects is to determine the rights of the parties to property growing out of the marriage. It does not involve the rendition of a personal judgment. It is, or may be, one of the legal effects of a decree of divorce without

riage with this plaintiff is an adulterous association. The executive of New York may demand from Massachusetts the rendition of the defendant as a bigamist; but can he be a bigamist whom Massachusetts had released from the former marriage? The absurd and mischievous consequences of the present judgment do not relieve me from the necessity of pronouncing it; but perhaps the exposition of them may not be amiss in the prevalent agitation for a uniform system of marriage and divorce."

[1] Cook *v.* Cook, 56 Wis. 195; 14 N. W. Rep. 33, 443.

[2] Mansfield *v.* McIntyre, 10 Ohio, 27; Cox *v.* Cox, 19 Ohio St. 502; 2 Am. Rep. 415; Cook *v.* Cook, 56 Wis. 195; 14 N. W. Rep. 33; Woods *v.* Waddle, 44 Ohio St. 449; 8 N. E. Rep. 297.

[3] Barrett *v.* Failing, 111 U. S. 523; 4 Sup. Ct. Rep. 598; Barber *v.* Root, 10 Mass. 260; Roth *v.* Roth, 104 Ill. 35; 44 Am. Rep. 81.

[4] Gould *v.* Crow, 57 Mo. 201.

any mention of or reference to property. There may be, of course, a direct adjudication fixing the rights of the parties in the property, but this, certainly, is such an adjudication as may be made upon constructive notice in such a case.

The doctrine that a judgment can be valid as to one party and not so as to the other is certainly an anomolous one and must lead to strange complications. It is believed that there can not in reason be any such middle ground upon this question. Such a decree should be held to be void as to both parties as it is in some of the states, or valid as to both as it is in others, so far as it affects the *status* of the parties. And the clear weight of the authorities is certainly to the effect that to this extent the decree is valid as to both the parties.

A decree for the custody of the children stands upon the same footing as the decree of divorce respecting its validity.[1] But a decree affecting the custody of the children is only binding while they are within the jurisdiction.[2]

In some cases it is held that a judgment in favor of the resident husband is binding upon the non-resident wife, on the ground that the domicile of the wife follows that of the husband, and that, therefore, her legal residence is in the state of his residence, and the courts of the state have jurisdiction over her in an action for divorce.[3] But this is not the generally accepted doctrine on the subject as will appear further on in this section. The better rule is that, for the purposes of a divorce, the actual residence of the parties, who are living separate and apart, must control.

Where neither of the parties is a resident of the state, the decree is void, although the offense constituting the ground for the divorce was committed within the state.[4] In most of the states the residence of the plaintiff vests

[1] Wakefield *v.* Ives, 35 Ia. 238. [2] Cooley Const. Lim., *p. 405.

[3] Loker *v.* Gerald, 31 N. E. Rep. 709.

[4] Baily *v.* Root, 10 Mass. 260; Van Fossen *v.* The State, 37 Ohio St. 317; 41 Am. Rep. 507; Litowich *v.* Litowich, 19 Kan. 451; 27 Am. Rep. 145; Hood *v.* State, 56 Ind. 263; Reed *v.* Reed, 52 Mich. 117; 17 N. W. Rep.

the court with jurisdiction, although the defendant has never been a resident of the state, and although the acts constituting the cause for divorce were committed within a foreign jurisdiction.[1] And for the purpose of bringing or defending a divorce suit, the wife may acquire a residence distinct from that of her husband.[2] This is denied in some of the cases. But it is undoubtedly supported by the great weight of authority. In some cases it is held that the wife may maintain her residence on the domicile of her husband, although not an actual resident herself,[3] or without other proof than that her husband is domiciled within the state.[4] But the better settled rule is that the residence of the plaintiff, to give jurisdiction, must be not mere legal residence, but actual residence within the state.[5]

It follows that a non-resident party can not maintain the action, under such a statute, although the defendant is a resident and the marriage was solemnized, and the cause for divorce arose, within the state.[6] The residence must

720; Smith *v.* Smith, 19 Neb. 706; 28 N. W. Rep. 296; State *v.* Armington, 25 Minn. 29; Watkins *v.* Watkins, 125 Ind. 163; 25 N. E. Rep. 175.

[1] Manley *v.* Manley, 3 Pinney (Wis.), 390; Hubbell *v.* Hubbell, 3 Wis. 662; 62 Am. Dec. 702; Cheever *v.* Wilson, 9 Wall. 108; Ewing *v.* Ewing, 24 Ind. 468; Tolen *v.* Tolen, 2 Blkf. (Ind.) 407; 21 Am. Dec. 743; Way *v.* Way, 64 Ill. 406; Thomson *v.* Thomson, 91 Ala. 591; 8 Sou. Rep. 419; Butler *v.* Washington, 12 Sou. Rep. 356; Smith *v.* Smith, 10 Sou. Rep. 248.

[2] Craven *v.* Craven, 27 Wis. 418; Cheever *v.* Wilson, 9 Wall. 108; Harteau *v.* Harteau, 14 Pick. 181; 25 Am. Dec. 372; Moffatt *v.* Moffatt, 5 Cal. 281; Tolen *v.* Tolen, 2 Blkf. (Ind.) 407; 21 Am. Dec. 743; Jenness *v.* Jenness, 24 Ind. 355; 87 Am. Dec. 335; Arrington *v.* Arrington, 102 N. Car. 491; 9 S. E. Rep. 200; Champon *v.* Champon, 40 La. Ann. 28; 3 Sou. Rep. 397; Smith *v.* Smith, 10 Sou. Rep. 248; 2 Bishop Mar. & Div., secs. 125, 126.

[3] Kashaw *v.* Kashaw, 3 Cal. 312.

[4] Smith *v.* Smith, 19 Neb. 706; 28 N. W. Rep. 296; Davis *v.* Davis, 30 Ill. 180; Ashbaugh *v.* Ashbaugh, 17 Ill. 476.

[5] Dutcher *v.* Dutcher, 39 Wis. 651; Jenness *v.* Jenness, 24 Ind. 355; 87 Am. Dec. 335; Tipton *v.* Tipton, 87 Ky. 243; 8 S. W. Rep. 440; Wood *v.* Wood, 54 Ark. 172; 15 S. W. Rep. 459; 2 Bishop Mar. & Div., secs. 127, 128.

[6] Dutcher *v.* Dutcher, 39 Wis. 651.

be *bona fide* and not for the mere purpose of obtaining a divorce, and to remain only so long as may be necessary for such purpose.[1] But the fact that a plaintiff's desire to obtain a divorce was the main cause of his becoming a resident of the state, does not affect the jurisdiction of the court.[2]

As to what will constitute a sufficient residence, see the cases cited below.[3] Usually a residence for a specified time is required by statute, which differs in the different states. And an allegation and proof of residence for the time fixed is necessary.[4]

An admission by the opposite party will not supply the proof of residence and give jurisdiction.[5] But it is held not to be essential that all of the jurisdictional facts should appear from the plaintiff's petition, but that it is sufficient if they appear from the whole record.[6]

The question whether the party is or is not a resident is one of fact.[7] And a finding upon it is at least *prima facie* evidence of the existence of the necessary facts upon a

[1] Dutcher *v.* Dutcher, 39 Wis. 651; Sewall *v.* Sewall, 122 Mass. 156; 23 Am. Rep. 299; Bennett *v.* Bennett, 28 Cal. 600; Reed *v.* Reed, 52 Mich. 117; 17 N. W. Rep. 720; Thomson *v.* Thomson, 91 Ala. 591; 8 Sou. Rep. 419; Firth *v.* Firth, 24 Atl. Rep. 916; Smith *v.* Smith, 10 Sou. Rep. 248.

[2] Colburn *v.* Colburn, 70 Mich. 647; 38 N. W. Rep. 607; Fosdick *v.* Fosdick, 15 R. I. 130; 23 Atl. Rep. 140.

[3] Dutcher *v.* Dutcher, 39 Wis. 651; Hall *v.* Hall, 25 Wis. 300; Coddington *v.* Coddington, 20 N. J. Eq. 263; Ross *v.* Ross, 103 Mass. 575; Way *v.* Way, 64 Ill. 406; Reed *v.* Reed, 52 Mich. 117; 17 N. W. Rep. 720; De Meli *v.* De Meli, 120 N. Y. 485; 24 N. E. Rep. 996; Chapman *v.* Chapman, 129 Ill. 386; 21 N. E. Rep. 806; Haymond *v.* Haymond, 74 Tex. 414; 12 S. W. Rep. 90; In re Feyh's Estate, 5 N. Y. Supl. 90; Colburn *v.* Colburn, 70 Mich. 647; 38 N. W. Rep. 607; Larquie *v.* Larquie, 40 La. Ann. 457; 4 Sou. Rep. 335; Tipton *v.* Tipton, 87 Ky. 243; 8 S. W. Rep. 440; Albee *v.* Albee, 31 N. E. Rep. 153; Firth *v.* Firth, 24 Atl. Rep. 916; 2 Bishop Mar. & Div., secs. 117, 118.

[4] Bennett *v.* Bennett, 28 Cal. 600; Haymond *v.* Haymond, 74 Tex. 414; 12 S. W. Rep. 90; Firth *v.* Firth, 24 Atl. Rep. 916; Powell *v.* Powell, 53 Ind. 513; Prettyman *v.* Prettyman, 125 Ind. 149; 25 N. E. Rep. 179.

[5] Prettyman *v.* Prettyman, 125 Ind. 149; 25 N. E. Rep. 179.

[6] Smith *v.* Smith, 48 Mo. App. 612.

[7] Cheever *v.* Wilson, 9 Wall. 108.

collateral attack.[1] But whether it is conclusive or not the authorities are not agreed. This question has been considered in another place.[2]

The rule is the same in actions for divorce as in other cases except that, on grounds of public policy, decrees for divorce are sometimes held to be final, and not subject to subsequent attack on grounds that would be fatal to judgments in other cases.[3] Thus, where a decree has been obtained by a fraudulent showing as to the residence of the plaintiff it is held that it can not be set aside on an original bill at a subsequent term of the court.[4]

It is upon this ground of public policy that no appeal is allowed, in many of the states, in divorce cases.[5] The better rule in divorce cases, as in all other cases, is that the correctness of a finding as to the residence of the parties, necessary to give the court jurisdiction, will not be inquired into, collaterally, by the courts of another state, in the absence of fraud.[6] But, as has been shown above, there are many decisions to the effect that such a finding is not conclusive, and may be disproved by evidence outside of the record.

The general rule, supported by the great weight of authority, is that a decree of divorce, rendered against a non-resident on constructive notice, is subject to attack on the ground that it was obtained by fraud.[7] And the cases

[1] Cheever *v.* Wilson, 9 Wall. 108; Waldo *v.* Waldo, 52 Mich. 94; 17 N. W. Rep. 710; Smith *v.* Smith, 10 Sou. Rep. 248.

[2] *Ante*, secs. 23, 25. See also Gregory *v.* Gregory, 78 Me. 187; 3 Atl. Rep. 280, 282, note; Reed *v.* Reed, 52 Mich. 117; 17 N. W. Rep. 720; Smith *v.* Smith, 10 So. Rep. 248; Neff *v.* Beauchamp, 74 Ia. 92; 36 N. W. Rep. 905.

[3] Parish *v.* Parish, 9 Ohio St. 534; 75 Am. Dec. 482; Bascom *v.* Bascom, 7 Ohio (part 2), 126.

[4] Parish *v.* Parish, 9 Ohio St, 534; 75 Am. Dec. 482; Greene *v.* Greene, 2 Gray, 361; 61 Am. Dec. 454.

[5] Laughery *v.* Laughery, 15 Ohio, 404; Tappan *v.* Tappan, 6 Ohio St. 64.

[6] Kinnier *v.* Kinnier, 45 N. Y. 535; 6 Am. Rep. 132; Waldo *v.* Waldo, 52 Mich. 94; 17 N. W. Rep. 710; Thomson *v.* Thomson, 91 Ala. 591; 8 Sou. Rep. 419.

[7] Sewell *v.* Sewell, 122 Mass. 156; 23 Am. Rep. 299; Hunt *v.* Hunt, 72 N. Y. 217; 28 Am. Rep. 129; Reed *v.* Reed, 52 Mich. 117; 17 N. W. Rep. 720.

holding to the contrary are cases in which the adverse party was before the court by personal service or an appearance. If, however, the defendant was a non-resident, was constructively notified, and had no knowledge of the action, and the fraud consisted in deceiving the court as to the jurisdictional fact of residence of the plaintiff, the judgment may be attacked on that ground.[1]

In some of the states, the residence of the plaintiff is not the only test of jurisdiction. The place of the commission of the offense constituting the cause for divorce is also material. Thus it is held that the action can not be maintained where the offense was committed out of the state at a time when the parties were non-residents.[2] But this doctrine is controlled by statutes to the contrary in most of the states, and has been expressly repudiated in some of the decided cases.[3]

In some of the states, in order to authorize the granting of a divorce, the parties must have lived together as husband and wife within the state.[4]

The federal courts have no jurisdiction upon the subject of divorce or the allowance of alimony, within the states, either as an original proceeding in chancery or as incident to a suit for divorce.[5] But they have jurisdiction to enforce a decree for alimony rendered by a state court.[5]

Orders or decrees for alimony, or for the custody or maintenance of the children of the parties, are usually subject to modification and the control of the court, even after final decree and after the term.[6] And it is usually held that where alimony is asked for in an action for di-

[1] Sewell *v.* Sewell, 122 Mass. 156; 23 Am. Rep. 299; Reed *v.* Reed, 52 Mich. 117; 17 N. W. Rep. 720.

[2] Norris *v.* Norris, 64 N. H. 523; 15 Atl. Rep. 19; Foss *v.* Foss, 58 N. H. 283; Heath *v.* Heath, 42 La. Ann. 437; 7 Sou. Rep. 540. See, also, Perzel *v.* Perzel, 15 S. W. Rep. 658.

[3] Jones *v.* Jones, 67 Miss. 195; 6 Sou. Rep. 712.

[4] Weston *v.* Weston, 143 Mass. 274; 9 N. E. Rep. 557

[5] Barber *v.* Barber, 21 How. 582.

[6] Bacon *v.* Bacon, 43 Wis. 197; Ewing *v.* Ewing, 24 Ind. 468; Ex parte Cottrell, 59 Cal. 417.

vorce, and during the pendency of such action, no notice to the defendant of such application is necessary.[1]

The power to grant such alimony or modify an order made therefor is not suspended by an appeal.[2] Orders allowing alimony, money for carrying on the action, or affecting the custody of children *pendente lite*, can only be made by the court before whom the divorce proceeding is pending, and must be made within the territorial jurisdiction of the court, or at chambers, within the jurisdiction, if allowed to be made by the judge, unless otherwise provided by law.[3]

The question whether the court has obtained jurisdiction or not turns, frequently, upon the sufficiency of the affidavit and other steps necessary to authorize publication of notice in lieu of personal service. This question of constructive service, or notice, so far as it relates to the general question of obtaining jurisdiction in all cases, has been considered in other sections of this work.[4] And the general principles laid down in the sections referred to, respecting constructive notice, are applicable to a proceeding for divorce. In this connection, cases bearing upon the sufficiency of such affidavits in divorce cases are cited in the foot-note.[5] In case of a collateral attack, it will be presumed, in the absence of a showing to the contrary, that a proper affidavit was made.[6] And recitals in the record of such service will, in the absence of a showing to the contrary, be presumed to be correct.[7]

Where the issuance of summons, and an effort of the sheriff to serve the same, is required, before publication can be had, such publication can not be made until after

[1] Mudd *v.* Mudd, 98 Cal. 320.

[2] Bohnert *v.* Bohnert, 91 Cal. 428; 27 Pac. Rep. 732.

[3] Bennett *v.* Southard, 35 Cal. 688.

[4] *Ante*, secs. 11, 13, 22, 23, 32, 33, 38.

[5] Bonsell *v.* Bonsell, 41 Ind. 476; Morrison *v.* Morrison, 64 Mich. 53; 30 N. W. Rep. 903; Pettiford *v.* Zoellner, 45 Mich. 358; 8 N. W. Rep. 57.

[6] *Ante*, secs. 23, 25; Hardy *v.* Beaty, 84 Tex. 562; 19 S. W. Rep. 778; Thomson *v.* Thomson, 91 Ala. 591; 8 Sou. Rep. 419; In re Newman, 75 Cal. 213; 16 Pac. Rep. 887.

[7] *Ante*, secs. 23, 25; Israel *v.* Arthur, 7 Colo. 5; 1 Pac. Rep. 438.

the return day of the summons, although the same may have been returned not found.[1]

A defective service may be waived by an appearance.[2]

In some of the states, something more than the publication of notice is required; for example, that the notice published shall be mailed to the defendant. Such requirement must be complied with in good faith, or a showing made that such provision could not be complied with, for good reason, or the judgment will be held void.[3]

Usually, personal service of summons or appearance is made necessary, by statute, to give jurisdiction as against a resident defendant in divorce cases as well as in other cases.[4]

74. ATTACHMENT.—Attachment is defined to be "a provisional remedy whereby a debtor's property, real or personal, or any interest therein capable of being taken under a levy and execution, is placed in the custody of the law to secure the interests of the creditor, pending the determination of the cause."[5] It is not a common-law remedy,[6] although it is said to have had its origin, in this country, in the custom of foreign attachment in London.[7] And the origin of the remedy is of but little if any practical importance at the present day in this country, because, whatever may have given rise to it, the remedy may be said to be wholly and entirely statutory.[8]

The proceeding is in the nature of, but not strictly, a proceeding *in rem*, because the mere seizure of the property does not give the court power to proceed to a final disposition of it without notice in some form to the de-

[1] Cheely *v.* Clayton, 110 U. S. 701; 4 Sup. Ct. Rep. 328; Israel *v.* Arthur, 7 Colo. 5; 1 Pac. Rep. 438; Palmer *v.* Cowdrey, 2 Colo. 1.

[2] Jones *v.* Jones, 108 N. Y. 415; 15 N. E. Rep. 707.

[3] Britton *v.* Britton, 45 N. J. Eq. 88; 15 Atl. Rep. 266.

[4] Willman *v.* Willman, 57 Ind. 500.

[5] 1 Am. & Eng. Enc. of Law, 894.

[6] Drake Attach., sec. 4; Wade Attach., sec. 2; Haywood *v.* Collins, 60 Ill. 328.

[7] Drake Attach., sec. 1; Wade Attach., sec. 1.

[8] Wade Attach., sec. 2; Haywood *v.* Collins, 60 Ill. 328.

fendant.[1] And in this consists the main difference between the statutory remedy of attachment in this country and that of the custom of London.[2]

Courts of equity have no jurisdiction to administer the remedy as a part of their general equity powers.[3] But the jurisdiction is in some of the states conferred upon courts of equity, and its exercise authorized in equitable suits and proceedings, and even in actions for damages for torts.[4] It is a remedy that is incidental to and which depends upon the right of the plaintiff to recover a judgment against the defendant, and can only be obtained in connection with, and during the pendency of, an action for the recovery of such judgment, or to establish a right thereto and have the property attached applied to the satisfaction of the amount claimed to be due or owing to the plaintiff, and is denominated a provisional remedy.[5] Therefore, if the main action fails, the attachment proceeding must fall with it.[6] And where the defendant is a non-resident and is not personally served, if the attachment proceeding fails, the main action is at an end. In such case, there is no jurisdiction, except by virtue of the attachment.[7] And where there is no personal service and the defendant is a non-resident, the proceeding is essentially one *in rem*.[8] Therefore, if the attachment is maintained, the property attached alone is subject to the judgment.[9] But the attachment may be maintained where the right to such judgment is established, although a per-

[1] Drake Attach., secs. 5, 436, 437; Wade Attach., sec. 7; Jarvis *v.* Barrett, 14 Wis. 591.

[2] Drake Attach., sec. 5.

[3] Drake Attach., sec. 4a.

[4] McKinsey *v.* Squires, 32 W. Va. 41; 9 S. E. Rep. 55; Ware *v.* Seasongood, 9 Sou. Rep. 138; Taylor *v.* Badoux, 21 S. W. Rep. 522; Altmeyer *v.* Caulfield, 37 W. Va. 847; 17 S. E. Rep. 409.

[5] Wade Attach., sec. 7; Jarvis *v.* Barrett, 14 Wis. 591; Lackett *v.* Rumbaugh, 45 Fed. Rep. 23.

[6] Lackett *v.* Rumbaugh, 45 Fed. Rep. 23; Reed *v.* Maben, 21 Neb. 696; 33 N. W. Rep. 252.

[7] Randle *v.* Mellen, 67 Md. 181; 8 Atl. Rep. 573; Kenney *v.* Goergen, 36 Minn. 190; 31 N. W. Rep. 210.

[8] *Ante*, sec. 14.

[9] Stanley *v.* Stanley, 35 S. Car. 94, 584; 14 S. E. Rep. 675.

sonal judgment can not be recovered, because of the fact that personal service has not been obtained. In such a case the attachment proceeding may be said to uphold the main action. And while the attachment proceeding is ancillary and dependent upon the main action for its support, it is so far independent that it rests upon its own facts, and not upon the facts of the action.[1]

The right to an attachment is not confined to residents, but may be resorted to by a non-resident creditor in aid of a cause of action arising out of the state.[2] But the right is sometimes limited by statute.[3] The proceeding is extraordinary, and is only allowed under special circumstances invariably imposed by statute. And as it is a right greatly subject to abuse, it is carefully guarded by the courts and confined strictly within the limits prescribed by the statute.[4] It is sometimes said that such statutory conditions must be strictly complied with.[5] And especially where the judgment is by default.[6] But this does not mean a literal compliance with the statute.[7] The better rule is that there must be a substantial compliance with all of the material requirements of the statute. And notwithstanding the strong language used in the decided cases, it will be found, upon an examination of them, that in much the greater number, where the question has been presented, proceedings complying substantially with the statutory requirements have been upheld. It is simply a difference between theory and practice that is not at all uncommon.

These requirements differ in the different states. But generally they are that an action in which an attachment

[1] Reed *v.* Maben, 21 Neb. 696; 33 N. W. Rep. 252.

[2] Sheldon *v.* Blanvelt, 29 S. Car. 453; 7 S.E. Rep. 593.

[3] Oliver *v.* Walter Haywood, etc., Co., 10 N. Y. Supl. 771; Taylor *v.* Badoux, 21 S. W. Rep. 522.

[4] Delaplain *v.* Armstrong, 21 W. Va. 211; Wando Phosphate Co. *v.* Rosenberg, 31 S. Car. 301; 9 S. E. Rep. 969.

[5] Foyles *v.* Kelso, 1 Blkf. (Ind.) 215; Lackett *v.* Rumbaugh, 45 Fed. Rep. 23; Lehman *v.* Broussard, 12 Sou. Rep. 504.

[6] Woolkins *v.* Haid, 49 Mich. 299; 13 N. W. Rep. 598.

[7] Altmeyer *v.* Caulfield, 37 W. Va. 847; 17 S. E. Rep. 409.

is allowed to be brought; that an affidavit, showing the facts necessary to entitle the plaintiff to such relief, be made by the plaintiff or by some one authorized by the statute to make it in his behalf; that a bond or undertaking, such as the statute requires, be given; and that a writ conforming to the statutory requirements be issued. And in order to acquire a lien upon specific property, the writ must be levied by the proper officer, as required by law; and in order to make the jurisdiction of the court effective and enforce the lien, notice must be served upon the defendant in the mode provided by law.

In some of the states, the attachment may issue before the action is actually pending. It is allowed in some cases to issue when the complaint is filed, where the action is not commenced until the summons is issued or served.[1] Statutes differ as to what shall constitute the commencement of the action. But for the purposes of attachment, the action is usually regarded as commenced when the complaint is filed and the summons issued, or the first publication made.[2] This depends, however, upon the language of each statute.[3] Sometimes the complaint or declaration is authorized to be filed within a specified time after the issuance of the writ. Under such a statute, the failure to file the complaint within the time limited defeats the attachment.[4] But it is held that the failure to file the declaration in time is an irregularity only that can not be taken advantage of collaterally.[5]

It is not within the scope of this work to discuss these different steps in an attachment proceeding, except so far as they affect the question of jurisdiction. But it is one of the peculiarities of the proceeding that all of the steps mentioned are necessary to vest the court with jurisdic-

[1] Schuster *v.* Rader, 13 Colo. 329; 22 Pac. Rep. 505.

[2] Coffman *v.* Brandhoeffer, 33 Neb. 279; 50 N. W. Rep. 6; Schulenberg *v.* Farwell, 84 Ill. 400.

[3] McLaughlin *v.* Wheeler, 50 N. W. Rep. 834; Jones *v.* Warnick, 49 Kan. 63; 30 Pac. Rep. 115.

[4] Russell *v.* Faulkner, 89 Ga. 818; 15 S. E. Rep. 756.

[5] Smith *v.* Runnels, 94 Mich. 617; 54 N. W. Rep. 375

tion in the first instance; or a failure to comply with them or either of them will, or may, wholly deprive the court of the power to proceed further, or render its jurisdiction ineffectual. Therefore, these different requirements of the law, and the steps necessary to be taken, affect the question of jurisdiction, directly or indirectly, and must receive attention. They will be considered separately, and:

1. *An action in which an attachment is allowed must be commenced and pending.*—Statutes differ in the different states as to the kinds of actions or the remedy sought to be enforced that may be aided by an attachment. But the pendency of an action in which an attachment is allowed is necessary to uphold the attachment proceeding.[1] Generally the remedy is confined to actions upon contracts, express or implied, for the recovery of money.[2] And this includes actions for unliquidated damages for a breach of contract,[3] although it is otherwise in some of the states.[4] But not an action for damages for a tort.[5]

In some of the states a special affidavit is necessary, in case the damages claimed are unliquidated, that the court may determine the amount for which a levy should be made.[6]

This, however, is a matter of statutory regulation, and the right may be given in actions for torts. And in some of the states the right to an attachment is given where the debt was fraudulently contracted, as, for example, where the money sued for was obtained by false pretenses or other fraud.[7] In such cases the cause of action is upon a con-

[1] Lackett *v.* Rumbaugh, 45 Fed. Rep. 23.

[2] 1 Am. & Eng. Enc. of Law, 895; Wade Attach., secs. 11, 12, 13; Farmers Nat'l Bank *v.* Fonda, 65 Mich. 533; 32 N. W. Rep. 664; Suksdorff *v.* Bigham, 12 Pac. Rep. 818.

[3] Guy *v.* Lee, 81 Ala. 163; 2 Sou. Rep. 273; Dunn *v.* Mackey, 80 Cal. 104; 22 Pac. Rep. 64; Baumgardner *v.* Dowagiac Manfg. Co., 52 N. W. Rep. 964; Withers *v.* Brittain, 35 Neb. 436; 53 N. W. Rep. 375.

[4] Wade Attach., sec. 13.

[5] 1 Am. & Eng. Enc. of Law, 895; Suksdorff *v.* Bigham, 12 Pac. Rep. 818.

[6] Guy *v.* Lee, 81 Ala. 163; 2 Sou. Rep. 273.

[7] Wade Attach., sec. 98.

tract, it is true, but it is the wrongful and tortious act of the defendant that supports the jurisdiction of the court in the attachment proceedings. In other states the right to an attachment is given in actions for damages for a tort.[1]

As to what will constitute an action upon contract within the meaning of the statutes on the subject, some authorities have been gathered in the foot note.[2]

If the proceeding is commenced in an action for a tort an amendment of the complaint so as to make it one upon contract will not validate the attachment.[3]

The commencement of the attachment proceeding before the time fixed by the statute, as, for example, before the summons is issued, renders the whole proceeding void.[4] But the writ may issue, under some of the statutes, at any time before the entry of final judgment.[5]

Where the affidavit for the attachment contains all of the allegations necessary to constitute it a complaint in the main action, the failure to file a separate complaint has been held to be a mere irregularity not affecting the jurisdiction of the court, and which may be obviated by an amendment.[6]

2. *Grounds upon which attachment may issue and the affidavit necessary to sustain them.*—In general the grounds

[1] Creasser *v.* Young, 31 Ohio St. 57; Sturdevant *v.* Tuttle, 22 Ohio St. 111; Wade Attach., sec. 99.

[2] Farmers Nat'l Bank *v.* Fonda, 65 Mich. 533; 32 N. W. Rep. 664; Ordenstein *v.* Bones, 12 Pac. Rep. 614; Hart *v.* Barnes, 24 Neb. 782; 40 N. W. Rep. 322; Gutta Percha, etc., Co. *v.* City of Houston, 108 N. Y. 276; 15 N. E. Rep. 402; Seeley *v.* Missouri, K. & T. Ry. Co., 39 Fed. Rep. 252; Tennessee Ru. Transp. Co. *v.* Cavanaugh, 93 Ala. 324; 9 Sou. Rep. 395; First National Bank *v.* Moss, 41 La. Ann. 227; 6 Sou. Rep. 25; Stiff *v.* Fisher, 21 S. W. Rep. 291; Withers *v.* Brittain, 35 Neb. 436; 53 N. W. Rep. 375; Kennedy *v.* California Sav. Bank, 97 Cal. 429; 31 Pac. Rep. 846; S. C. V. Peat Fuel Co. *v.* Tuck, 53 Cal. 304.

[3] Suksdorff *v.* Bigham, 12 Pac. Rep. 818; Cole *v.* Aune, 40 Minn. 80; 41 N. W. Rep. 934.

[4] Kellar *v.* Stanley, 86 Ky. 240; 5 S. W. Rep. 477.

[5] Davis *v.* Jenkins, 26 Pac. Rep. 459.

[6] Sannoner *v.* Jacobson, 47 Ark. 31; Lehman *v.* Lowman, 50 Ark. 444; 8 S. W. Rep. 187.

of an attachment are the absence, concealment, or non-residence of the defendant, fraudulent disposition, incumbrance, removal or concealment of property subject to execution, and the presence of property within the jurisdiction of the court subject to execution.

The affidavit for the attachment must show the existence of one or more of the causes enumerated in the statute, at the time the writ is asked for.[1] It must also show the indebtedness of the defendant to the plaintiff upon such a contract or liability as will authorize an attachment, the amount of the indebtedness, whether the demand is due or to become due, that the contract was made or is payable in the state (where this is a condition upon which an attachment is allowed), and, in some of the states, that the indebtedness is not secured by any mortgage or other lien, in some that the demand is just, and that the action is not prosecuted to harass the defendant or to hinder or to delay or defraud any of his creditors, and that there is property of the defendant within the jurisdiction subject to execution.[2]

The affidavit must correspond with the complaint or petition respecting matters necessary to be stated in both, and a material variance between them is fatal.[3] The ulti-

[1] Wade Attach., sec. 7.

[2] Wade Attach., secs. 65, 66, 67, 68, 69, 70, 71; Blackwood *v.* Jones, 27 Wis. 498; Frantz *v.* Wendel, 28 Ind. 391; First Nat'l Bank *v.* Moss, 41 La. Ann. 227; 6 Sou. Rep. 25; Gessner *v.* Palmateer, 89 Cal. 89; 26 Pac. Rep. 789; Heudkins *v.* Haskins, 22 W. Va. 645.

"The essential facts differ in different states, but in nearly all the affidavit must show the nature of the demand, *i. e.*, the facts from which the indebtedness arose, the amount of the claim, whether the demand is actually due or about to become due; and, in many, averment must be made that the demand is just, and that the action is not brought to vex or harass the debtor, nor to hinder, delay or defraud his creditors. In addition to these essential facts the statutory 'grounds of the attachment' must also be alleged to entitle the plaintiff to the writ." 1 Am. & Eng. Enc. of Law, 902.

[3] Focke *v.* Hardeman, 67 Tex. 173; 2 S. W. Rep. 363; Horton *v.* Miller, 84 Ala. 537; 4 Sou. Rep. 370; Moore *v.* Corley, 16 S. W. Rep. 787; Kennedy *v.* California Sav. Bank, 97 Cal. 429; 31 Pac. Rep. 846; Bowers *v.* London Bank, 3 Utah, 417; 4 Pac. Rep. 225.

mate facts necessary to authorize the issuance of the writ must be stated positively and with certainty.[1] But sometimes, as to some of the causes, an allegation that the plaintiff believes, and has good reason to believe, that a cause averred exists, or language of similar import, is allowed.[2]

It is not necessary to state the probative facts,[3] but ultimate facts must be stated and not mere conclusions.[4] If several grounds for the attachment are stated, they must not be stated in the alternative or disjunctively.[5] And an affidavit stating two grounds for an attachment which are inconsistent with each other, and one of which must be untrue, if the other is true, is fatally defective.[6]

Generally it is sufficient to state the grounds in the language of the statute.[7] But the use of the language of the statute is not indispensable. Other language, showing the existence of the grounds, or any of them, is sufficient.[8] And in some of the states it is not sufficient to state certain of the grounds in the language of the statute. The facts showing the existence of the grounds must be averred.[9] If more than one ground is alleged, it is sufficient if one only of the number is sustained by proof at the hearing.[10]

[1] 1 Am. & Eng. Enc. of Law, 904; Enneking *v.* Clay, 79 Ga. 598; 7 S. E. Rep. 257; Meinhard *v.* Neill, 11 S. E. Rep. 613; Nelson *v.* Fuld, 89 Tenn. 466; 14 S. W. Rep. 1079; Hinter *v.* Boutilier, 22 N. Y. Supl. 64.

[2] Byles *v.* Rowe, 64 Mich. 522; 31 N. W. Rep. 463; Solinsky *v.* Lincoln Savings Bank, 85 Tenn. 368; 4 S. W. Rep. 836.

[3] 1 Am. & Eng. Enc. of Law, 904.

[4] Howell *v.* Muskegon Circuit Judge, 88 Mich. 361; 50 N. W. Rep. 306; National Broadway Bank *v.* Barker, 16 N. Y. Supl. 75.

[5] Wilke *v.* Cohn, 54 Cal. 212; Winters *v.* Pearson, 72 Cal. 553; 14 Pac. Rep. 304; Drake Attach., sec. 102; Dintruff *v.* Tuthill, 17 N. Y. Supl. 556.

[6] Dunnenbaum *v.* Scram, 59 Tex. 281.

[7] Loeb *v.* Smith, 78 Ga. 504; 3 S. E. Rep. 458; Ruppert *v.* Haug, 87 N. Y. 141.

[8] Creasser *v.* Young, 31 Ohio St. 57; Ruppert *v.* Haug, 87 N. Y. 141.

[9] Delaplain *v.* Armstrong, 21 W. Va. 211; Kibbe *v.* Herman, 3 N. Y. Supl. 852; Wando Phosphate Co. *v.* Rosenberg, 31 S. Car. 301; 9 S. E. Rep. 969; Hudkins *v.* Haskins, 22 W. Va. 645.

[10] Strauss *v.* Abrahams, 32 Fed. Rep. 310.

Under a statute which denies the right to an attachment where the plaintiff has a lien upon property, a vendor's lien for purchase-money of real estate, where the notes for such purchase-money have been assigned to the plaintiff, is within the statute.[1]

The affidavit is the foundation and support of the jurisdiction of the court, and the general rule is that the omission to make it, or the failure to state in it any of the essential facts, will render the whole proceeding void.[2] This general statement of the rule is subject to some modification, however. In many of the states, the affidavit may be amended. And where such amendments are allowed, it is generally held that any defect in the affidavit that may be amended will render a judgment rendered thereon voidable only and not void.[3] And, irrespective of any right given to amend, a mere defect in the affidavit must be distinguished from an entire failure to make any affidavit at all. But to what extent or in what respects an affidavit may fall short of the statutory requirements and yet be sufficient to uphold the jurisdiction of the court, in case of a collateral attack, is not easily answered either on principle or from the authorities.[4]

A complaint and affidavit for attachment may, under the practice in some of the states, be combined.[5] And the affidavit may be aided by allegations in the complaint, or by the instrument creating the indebtedness made the foundation of the action and attachment.[6] As to what

[1] Gessner *v.* Palmateer, 89 Cal. 89; 26 Pac. Rep. 789.

[2] 1 Am. & Eng. Enc. of Law, 901; Wade Attach., secs. 6, 55 et seq.; Kruse *v.* Wilson, 79 Ill. 233; Burnett *v.* McCluey, 92 Mo. 230; 4 S. W. Rep. 694; Bray *v.* McClury, 55 Mo. 128; Wando Phosphate Co. *v.* Rosenberg, 31 S. Car. 301; 9 S. E. Rep. 969.

[3] Burnett *v.* McCluey, 92 Mo. 230; 4 S. W. Rep. 694; Booth *v.* Rees, 26 Ill. 45; Moore *v.* Mauck, 79 Ill. 391.

[4] See, on this subject, Booth *v.* Rees, 26 Ill. 45; Landfair *v.* Lowman, 50 Ark. 446; 8 S. W. Rep. 188.

[5] Sannover *v.* Jacobson, 47 Ark. 31; 14 S. W. Rep. 458; Dunn *v.* Crocker, 22 Ind. 324.

[6] Panhandle Nat. Bank *v.* Still, 84 Tex. 339; 19 S. W. Rep. 479.

will constitute a sufficient affidavit, generally, see the authorities below.[1] The same affidavit may serve as one for publication and for an attachment, if it contains the necessary allegations required for both.[2]

In some of the cases, the proceeding, with respect to the question of jurisdiction, is treated as strictly one *in rem.*, and it is held that it is the seizure of the property that gives the court jurisdiction, and that in case of a collateral attack it can not be held that the court was without jurisdiction because of defects in the affidavit or a failure to give notice to the defendant.[3]

[1] Booth *v.* Rees, 26 Ill. 45; Burnett *v.* McCluey, 92 Mo. 230; 4 S. W. Rep. 694; Kruse *v.* Wilson, 79 Ill. 233; Moore *v.* Mauck, 79 Ill. 391; Bray *v.* McClury, 55 Mo. 128; Robinson *v.* Hesser, 4 N. Mex. 144; 13 Pac. Rep. 204; Hart *v.* Barnes, 24 Neb. 782; 40 N. W. Rep. 322; Labalt *v.* Schulhof, 4 N. Y. Supl. 819; Perrill *v.* Kauffman, 72 Tex. 214; 12 S. W. Rep. 125; Buehler *v.* De Lemos, 48 N. W. Rep. 42; Munzenheimer *v.* Manhattan, etc., Co., 82 Tex. 351; 15 S. W. Rep. 389; Hudkins *v.* Haskins, 22 W. Va. 645.

[2] Burnett *v.* McCluey, 92 Mo. 230; 4 S. W. Rep. 694; Miller *v.* Eastman, 27 Neb. 408; 43 N. W. Rep. 179; Cosner's Adm'r *v.* Smith, 36 W. Va. 788; 15 S. E. Rep. 977; Avery *v.* Good, 21 S. W. Rep. 815.

[3] Cooper *v.* Reynolds, 10 Wall. 308.

"Now, in this class of cases, on what does the jurisdiction of the court depend? It seems to us that the seizure of the property, or that which, in this case, is the same in effect, the levy of the writ of attachment on it, is the one essential requisite to jurisdiction, as it, unquestionably, is in proceedings purely *in rem.* Without this the court can proceed no further; with it the court can proceed to subject that property to the demand of plaintiff. If the writ of attachment is the lawful writ of the court, issued in proper form under the seal of the court, and if it is by the proper officer levied upon property liable to the attachment, when such a writ is returned into court, the power of the court over the *res* is established. The affidavit is the preliminary to issuing the writ. It may be a defective affidavit, or possibly the officer whose duty it is to issue the writ may have failed in some manner to observe all the requisite formalities; but the writ being issued and levied, the affidavit has served its purpose and, though a revisory court might see in some such departure from the strict direction of the statute sufficient error to reverse the judgment, we are unable to see how that can deprive the court of the jurisdiction acquired by the writ levied upon defendant's property.

"So, also, of the publication of notice. It is the duty of the court to order such publication, and to see that it has been properly made, and,

While, in other cases, it is held that it is the presence of property within the jurisdiction of the court that gives it jurisdiction of the case, and that a seizure of property is only necessary to protect the plaintiff from a removal or sale of the property.[1] And in still others that it is the affidavit that puts the jurisdiction of the court in motion, and that subsequent proceedings, including the attachment of the property, are not jurisdictional, and defects in such subsequent proceedings are mere irregularities not affecting the jurisdiction of the court.[2] But, whether the proceeding is regarded as strictly one *in rem.* or not, the better rule is that where there is no personal service, it is only by attaching the property that the court obtains jurisdiction, and that its authority does not extend beyond the property attached.[3]

It does not follow, however, that the subsequent proceedings are not jurisdictional. Other steps may, and often are, required to be taken which, if omitted, will put an end to the jurisdiction acquired by the levy of the writ.

It may be more convenient to treat of the different parts and elements of the affidavit separately, and

a. By whom the affidavit may be made. As to the person by whom the affidavit shall be made, statutes differ. Some require the affidavit to be made by the plaintiff. Others permit it to be made by an attorney or agent.[4] An attorney must be authorized as such at the time the affidavit is made, or it will not sustain the writ. A subsequent ratification will not constitute a compliance

undoubtedly, if there has been no such publication, a court of errors might reverse the judgment.

"But when the writ has been issued, the property seized, and that property been condemned and sold, we can not hold that the court had no jurisdiction for want of a sufficient publication of notice." Cooper *v.* Reynolds, 10 Wall. 308, 321.

[1] Jarvis *v.* Barrett, 14 Wis. 591. [2] Kruse *v.* Wilson, 79 Ill. 233.

[3] Kenney *v.* Goergen, 36 Minn. 190; 31 N. W. Rep. 210.

[4] Gazan *v.* Royce, 78 Ga. 512; 3 S. E. Rep. 753; Hardie *v.* Colvin, 43 La. Ann. 851; 9 Sou. Rep. 745.

with the statute.[1] By some of the statutes, it is authorized to be made by any credible person.[2]

b. Averment of the cause of action and the amount due. The affidavit must show that there is a cause of action, and that it is one in which an attachment is authorized.[3] And in order to show that it is an action in which an attachment may issue, the nature of the plaintiff's claim must be stated.[4] The amount due must be alleged.[5] This is sometimes permitted to be done by reference to a verified complaint showing the fact. And where the instrument made the foundation of the action, and proceeding, is set out and shows the debt to be due, an omission to state it in the affidavit is not fatal.[6]

It is held that a variance between the affidavit and the complaint, as to the amount due, must be taken advantage of in the trial court, and that the objection can not be made on appeal.[7] It follows from this rule that such a variance does not affect the jurisdiction of the court.

It is not necessary that the contract sued upon shall show on its face the amount due upon it. It is sufficient if it appears from the affidavit.[8] But the contract must be such that the amount due can be ascertained with reasonable certainty, or the attachment can not be maintained.[9] Where parties may be sued jointly, but are only liable severally, each for his proportionate part of the debt,

[1] Johnson *v.* Johnson, 31 Fed. Rep. 700.

[2] Ruhl *v.* Rogers, 29 W. Va. 779; 2 S. E. Rep. 798.

[3] Blackwood *v.* Jones, 27 Wis. 498; Ward *v.* Howard, 12 Ohio St. 158; Hart *v.* Barnes, 24 Neb. 782; 40 N. W. Rep. 322; Gunst *v.* Pelham, 12 S. W. Rep. 233; Dunn *v.* Mackey, 80 Cal. 104; 22 Pac. Rep. 64; Haebler *v.* Bernharth, 4 N. Y. Supl. 873; Wade Attach., sec. 65.

[4] Hudkins *v.* Haskins, 22 W. Va. 645.

[5] Burnett *v.* McCluey, 92 Mo. 230; 4 S. W. Rep. 694; Booth *v.* Rees, 26 Ill. 45; Dunn *v.* Mackey, 80 Cal. 104; 22 Pac. Rep. 64; Haebler *v.* Bernharth, 4 N. Y. Supl. 873; Cosner's Adm. *v.* Smith, 36 W. Va. 788; 15 S. E. Rep. 977.

[6] Panhandle Nat. Bank *v.* Still, 84 Tex. 339; 19 S. W. Rep. 479.

[7] Fears *v.* Thompson, 82 Ala. 294; 2 Sou. Rep. 719.

[8] Dunn *v.* Mackey, 80 Cal. 104; 22 Pac. Rep. 64.

[9] Hochstadder *v.* Sam, 73 Tex. 315; 11 S. W. Rep. 408.

as in case of the statutory liability of stockholders of a corporation for its debts, the amount due from each fixes the amount for which the attachment may issue against him, and it has been held that a writ issued against all of the stockholders, jointly, for the whole amount due, can not be upheld.[1] In some of the states, the affidavit must show that "the plaintiff is entitled to recover a sum stated therein over and above all counterclaims known to him." Under this peculiar language, if the affidavit is made by any one other than the plaintiff, he must show thereby that he has knowledge of such indebtedness and the sources of his information.[2] And whether the affidavit is made by the plaintiff or some one else, a mere showing that the defendant is indebted to the plaintiff in the amount stated, and that the plaintiff is justly entitled to recover said sum, is insufficient to give the court jurisdiction to issue the writ. The language of the statute as to the counterclaim, or equivalent words, must be used.[3]

c. Presence of property within the jurisdiction of the court. In some of the states, the affidavit is required to show that the defendant has property within the jurisdiction of the court. And it has been held that it is not the making of the affidavit to that effect that gives jurisdiction, but the property must in fact be within the jurisdiction of the court, and therefore the fact alleged may be controverted.[4] But, as we shall see directly, it is usually held that the actual seizure or levy upon the property is necessary to confer jurisdiction over it, where there is no personal service.

The allegation that the defendant has property within the state is not always required.[5] But whether it is or not, the fact must exist, where the defendant is a non-resi-

[1] Kennedy *v.* California Savings Bank, 97 Cal. 93; 31 Pac. Rep. 846.
[2] Lee *v.* Co-operative L. & A. Ass'n, 2 N. Y. Supl. 864.
[3] Ruppert *v.* Haug, 87 N. Y. 141.
[4] *Ante*, sec. 14; Fiske *v.* Anderson, 33 Barb. (N. Y.) 71.
[5] Kenney *v.* Goergen, 36 Minn. 190; 31 N. W. Rep. 210.

dent and not personally served, in order to give the court jurisdiction.[1]

d. Non-residence of the defendant. In most of the states, the non-residence of the defendant is made a ground of attachment.[2] Where the action is against joint debtors, as in case of partners, no attachment can be maintained against one of such debtors on the ground of his non-residence, the other joint debtor being a resident. Therefore the affidavit must show the non-residence of both.[3] The question is one of actual residence, and not one of domicile.[4]

e. Absconding debtors.—The concealment of a debtor or his leaving his place of residence to avoid liability, is usually made a ground for attachment.[5]

f. Fraudulent disposition, removal of, or intent to remove, property out of the jurisdiction.[6]—Allegations of fraud or concealment in the affidavit are usually permitted by statute to be made on information and belief.[7] But the grounds of such belief are required, in some of the states, to be set forth in the affidavit.[8] And in such cases the grounds of such belief or the question whether there has been such fraud or concealment is one of fact to be determined, on the hearing, from all the circumstances.[7]

In some of the states it must appear from the affidavit that the property fraudulently transferred, or about to be

[1] Anderson *v.* Goff, 72 Cal. 65; 13 Pac. Rep. 72.

[2] Burnett *v.* McCluey, 92 Mo. 230; 4 S. W. Rep. 694.

[3] Curtis *v.* Hollingworth, 14 N. J. Law, 402; Corbit *v.* Corbit, 50 N. J. Law, 363; 13 Atl. Rep. 178.

[4] Keller *v.* Carr, 40 Minn. 428; 42 N. W. Rep. 292; Lawson *v.* Adlard, 46 Minn. 243; 48 N. W. Rep. 1019; Andrews *v.* Mundy, 36 W. Va. 22; 14 S. E. Rep. 414; Hanover Nat. Bank *v.* Stebbins, 23 N. Y. Supl. 529.

[5] Bank of Commerce *v.* Payne, 86 Ky. 446; 8 S. W. Rep. 856; Holland *v.* Commercial Bank, 22 Neb. 571; 36 N. W. Rep. 113; National Bank of Commerce *v.* Whiteman Pulp, etc., Co., 21 N. Y. Supl. 748.

[6] Mixon *v.* Holley, 26 S. Car. 256; 2 S. E. Rep. 385.

[7] Solinsky *v.* Lincoln Savings Bank, 85 Tenn. 368; 4 S. W. Rep. 836; Roddey *v.* Erwin, 31 S. Car. 36; 9 S. E. Rep. 729.

[8] Roddey *v.* Erwin, 31 S. Car. 36; 9 S. E. Rep. 729; Myers *v.* Whiteheart, 24 S. Car. 196; Wando Phosphate Co. *v.* Rosenberg, 31 S. Car. 301; 9 S. E. Rep. 969.

disposed of, is subject to execution.[1] And whether it must be averred or not the property must be shown to be subject to execution, else the disposition of it can not be fraudulent.[1]

g. Concealment so that service of process can not be had, or to avoid such service.—Under this clause, in some of the states, the intent with which the defendant conceals himself is material. It is not sufficient, therefore, to show absence merely, without any showing that the party is concealing himself for the purpose mentioned in the statute.[2] While, under other statutes, the intent is held to be immaterial, if the concealment is such as to prevent the service of process.[3] This results from the different language used in different statutes.

h. Debt fraudulently incurred.—The fraud made ground for an attachment must relate to the time of making the contract, or incurring the indebtedness, and must have been perpetrated for the purpose, and with the intent, to procure it.[4]

"Speaking generally a debt may be said to have been fraudulently contracted for two reasons: *First*, when a debtor has induced his creditor to sell him goods and extend to him credit by means of false representations as to his financial condition, or as to his means and ability of paying for the same; and, *secondly*, when a debtor has bought goods or property of any kind on credit with a preconceived intention of getting the possession of the articles bought, and disposing of them, and not paying for the same at any time."[5]

So an attachment will lie for damages resulting from false representations whereby one is induced to purchase land and pay therefor more than its true value as a debt obtained under false pretenses.[6]

[1] Blair *v.* Smith, 114 Ind. 114; 15 N. E. Rep. 817.
[2] Head *v.* Wollner, 6 N. Y. Supl. 916.
[3] Wilkinson *v.* King, 81 Ala. 156; 8 Sou. Rep. 189.
[4] Wade Attach., sec. 98.
[5] Strauss *v.* Abrahams, 32 Fed. Rep. 310, 313.
[6] Stanhope *v.* Swafford, 80 Ia. 45; 42 N. W. Rep. 450.

The proceeding can not be maintained in aid of several claims, a part only of which have been fraudulently contracted.[1] A showing of negligence will not sustain this ground of attachment.[2] But proof of embezzlement will.[3]

i. Obligations criminally incurred. In some of the states, the remedy by attachment is not confined to actions upon contract, but is allowed where the obligation is criminally incurred.[4] A liability incurred by the commission of a crime is one criminally incurred.[5]

j. Where claim sued upon is not yet due. An attachment before the debt is due is usually allowed only on the ground that property of the debtor is about to be so disposed of or removed as to deprive the plaintiff of a resort to it for the satisfaction of his claim when due. Therefore, one or the other of the specific grounds upon which the writ is authorized in such cases must be shown by the affidavit.[6] Therefore, it is not allowed on the ground of non-residence alone, where there is property within the jurisdiction.[7] An order of court authorizing the issuance of the writ in such cases is required in some of the states.[8] And under such a statute, a writ issued by the clerk without an order of court is void.[9]

k. Sources of information as to facts averred. It is sometimes insufficient to state a fact positively in the affidavit, as held in some of the states, where the same is made by some one other than the plaintiff. The party making the

[1] Estlow *v.* Hanna, 75 Mich. 219; 42 N. W. Rep. 812; Myer *v.* Evans, 27 Neb. 367; 43 N. W. Rep. 109.

[2] Rawlins *v.* Powers, 25 Neb. 681; 41 N. W. Rep. 651.

[3] Cole *v.* Aune, 40 Minn. 80; 41 N. W. Rep. 934.

[4] Wade Attach. 99; Creasser *v.* Young, 31 Ohio St. 57; Kuehn *v.* Paroni, 20 Nev. 203; 19 Pac. Rep. 273.

[5] Kuehn *v.* Paroni, 20 Nev. 203; 19 Pac. Rep. 273.

[6] Wearne *v.* France, 3 Wyo. 273; 21 Pac. Rep. 703; Wingo *v.* Purdy, 87 Va. 472; 12 S. E. Rep. 970; Cox *v.* Dawson, 2 Wash. St. 381; 26 Pac. Rep. 973; Merchants & Farmers Bank *v.* McKellar, 44 La. Ann. 940; 11 Sou. Rep. 592.

[7] Wingo *v.* Purdy, 87 Va. 472; 12 S. E. Rep. 970.

[8] Kleine *v.* Nie, 88 Ky. 542; 11 S. W. Rep. 590; Peoples Bank *v.* Bachelder, 51 Fed. Rep. 130.

[9] Philpot *v.* Newman, 11 Neb. 299; 9 N. W. Rep. 94.

affidavit must allege, in addition, such facts or circumstances as will show that he has actual knowleege of the fact alleged.[1] He must show the sources of his information.[2] But this is not usually required.[3]

l. Additional averments where affidavit made by attorney or agent. Where the affidavit by an attorney or agent is allowed, it is usually upon conditions, for example, the absence of the plaintiff.[4] And the existence of the conditions is usually required to be shown in the affidavit.[4] But a failure to do so is held to be a mere irregularity not affecting the jurisdiction of the court so as to render a judgment under it void.[4] It would be a fatal objection, however, on a motion to quash the writ, made at the proper time.[4]

The fact that the party making the affidavit is an attorney or agent of the plaintiff is usually required to be alleged in the affidavit;[5] and the fact, when alleged, is an issuable one, and the failure to sustain it by proof, when denied, will defeat the attachment.[5] So an agent or attorney who alleges a fact positively is sometimes required to show, in addition, that he has been so situated as to have actual knowledge of the fact.[5] But this requirement is unusual.[7]

3. *The bond or undertaking.*—The giving of a bond, in substantial compliance with the requirements of the statute, is necessary to uphold the attachment.[8] But a bond is not required in all cases, and where it is not required the failure to give it does not affect the jurisdiction.[9]

[1] McVicker *v.* Campanini, 2 N. Y. Supl. 577.

[2] Crowns *v.* Vail, 2 N. Y. Supl. 218; Hamilton *v.* Steck, 5 N. Y. Supl. 831.

[3] Sioux Valley, etc., Bank *v.* Kellogg, 81 Ia. 124; 46 N. W. Rep. 859.

[4] Wescott *v.* Sharp, 50 N. J. Law, 392; 13 Atl. Rep. 243.

[5] Johnson *v.* Johnson, 31 Fed. Rep. 700.

[6] McVicker *v.* Campanini, 2 N. Y. Supl. 577; Hamilton *v.* Steck, 5 N. Y. Supl. 831.

[7] Sioux Valley, etc., Bank *v.* Kellogg, 81 Ia. 124; 46 N. W. Rep. 859.

[8] Drake Attach., sec. 115; Clay *v.* Tapp Leather Co., 79 Ga. 596; 7 S. E. Rep. 256; Enneking *v.* Clay, 79 Ga. 598; 7 S. E. Rep. 257.

[9] Olmsted *v.* Rivers, 9 Neb. 234; 2 N. W. Rep. 366; Kenific *v.* Caulfield, 88 Va. 122; 13 S. E. Rep. 348.

And, even when required to be given, the failure to give it is held to be an irregularity, merely, not affecting the jurisdiction of the court, and which may be waived.[1] So in case of irregularities in the bond.[2]

In some of the states it is provided by statute that no writ of attachment shall be invalid by reason of defects in the bond.[3] But in other states it is held that the court has no jurisdiction where no bond, or a fatally defective one, is given.[4]

Sometimes certain parties, as, for example, the state, or other public corporations are not required to give bond.[5] In some of the states the bond must be executed by the plaintiff.[6] In others it is sufficient if executed by others, as sureties, on behalf of the plaintiff.[7] The question turns wholly upon the requirements of the statute in each state. If the bond is required to be executed by the plaintiff and is signed only by strangers, it is void.[8] As to what will constitute a sufficient bond, see the cases cited below.[9]

4. *The writ of attachment.*—In order to apply the jurisdiction of the court to any particular property, and authorize a judgment against, and a sale of it for the satisfaction of the plaintiff's claim, a writ of attachment, conforming to the requirements of the statute, must issue.[10]

[1] Ward *v.* Howard, 12 Ohio St. 158; O'Farrell *v.* Stockman, 19 Ohio St. 296.

[2] Kramer *v.* Wellendorff, 129 Pa. St. 547; 10 Atl. Rep. 892.

[3] Jones *v.* Bank of Leadville, 10 Colo. 464; 17 Pac. Rep. 272.

[4] Wagener *v.* Booker, 31 S. Car. 375; 9 S. E. Rep. 1055.

[5] Drake Attach., sec. 114 c.

[6] National Ex. Bank *v.* Stelling, 31 S. Car. 360; 9 S. E. Rep. 1028.

[7] Eckman *v.* Hammond, 27 Neb. 611; 43 N. W. Rep. 397.

[8] Booker *v.* Smith, 16 S. E. Rep. 774.

[9] Rohrbough *v.* Leopold, 68 Tex. 254; 4 S. W. Rep. 460; National Ex. Bank *v.* Stelling, 31 S. Car. 360; 9 S. E. Rep. 1028; Wagener *v.* Booker, 31 S. Car. 375; 9 S. E. Rep. 1055; Solinskey *v.* Young, 17 S. W. Rep. 1083; Louisville N. A., etc., Ry. Co. *v.* Lake, 32 N. E. Rep. 590; Booker *v.* Smith, 16 S. E. Rep. 774.

[10] *Ante*, sec. 14; Parks *v.* Watts, 112 Pa. St. 4; 6 Atl. Rep. 106; Williamson *v.* McCormick, 126 Pa. St. 274; 17 Atl. Rep. 591; Byers *v.* Brannon, 19 S. W. Rep. 1091.

In most of the states the writ is issued, as of course, by the clerk of the court, upon the filing of the affidavit and an undertaking, when required, without an order of court. In others an order of court is necessary,[1] and sometimes an order of court is required in special cases and not in others.[2]

As the proceeding is auxiliary to the main action it is usually required that the writ issue at the time of, or after, the filing of the complaint or issuance of the summons. And a writ issued before the time fixed is void.[3] In some of the states the writ is required to conform to and recite the facts contained in the affidavit; in others it is required to conform to the complaint. In either case it is insufficient if it varies materially from the one or the other as the case may be.[4]

Where the writ is required to be made returnable on the next return day it will be quashed if made returnable at a later time. Such a writ is essentially illegal and an appearance to the action will not cure the defect.[5] The writ is insufficient in form if it states different grounds for the attachment in the alternative.[6] Statutory provisions as to what the writ shall contain are mandatory, and if any of the matters required to be stated are omitted the writ can not, in the absence of express statutory authority therefor, be amended by inserting them.[7]

5. *Levy of the writ and proof of its service.*—A levy of the writ by a seizure of the property attaches the jurisdiction of the court to the property thus seized, and it is from that time in the custody of the court and made subject to any judgment that may subsequently be rendered.

[1] Loeb *v.* Smith, 78 Ga. 504; 3 S. E. Rep. 458.

[2] Kleine *v.* Nie, 88 Ky. 542; 11 S. W. Rep. 590; Atkinson *v.* James, 10 Sou. Rep. 846; Winchell *v.* McKenzie, 53 N. W. Rep. 975.

[3] Kellar *v.* Stanley, 86 Ky. 240; 5 S. W. Rep. 477.

[4] Focke *v.* Hardeman, 67 Tex. 173; 2 S. W. Rep. 363; Moore *v.* Corley, 16 S. W. Rep. 787.

[5] Williamson *v.* McCormick, 126 Pa. St. 274; 17 Atl. Rep. 591. But see to the contrary, Post *v.* Bird, 28 Fla. 1; 9 Sou. Rep. 888.

[6] Dintruff *v.* Tuthill, 17 N. Y. Supl. 556.

[7] McDonald *v.* Kieferdorf, 18 N. Y. Supl. 763.

The levy on the property vests the court with jurisdiction of the subject-matter.[1] And, as we have seen, this seizure of the property is held, in some of the cases, to be the one thing essential to give the court jurisdiction.[2] And certainly such seizure or other levy is necessary to bring the property within the jurisdiction of the court and protect it from the claims of others, or a removal of it from the jurisdiction, until a judgment is recovered that will authorize its sale to satisfy the plaintiff's claim.[3] And this is the primary object and purpose of the proceeding in attachment.[4] But, as we have seen above, some of the courts have held that the question whether the property was attached or not is not a jurisdictional question.[5]

The return of the officer or other proof of service must show that a levy was made in the manner required by the statute.[6] The levy of the writ, where there is no personal service on the defendant, not only fixes and preserves the lien of the plaintiff, but it measures and limits the jurisdiction of the court which extends no further than to dispose of the property levied upon.[7] And in order to preserve the lien and continue the jurisdiction the possession of the property, if movable, must be maintained unless released by the giving of bond as provided by law.[8]

The true rule seems to be that both a levy on the property and notice to the non-resident are necessary to give

[1] Haywood *v.* Collins, 60 Ill. 328; Robertson *v.* Hoge, 83 Va. 124; 1 S. E. Rep. 667; Tiffany *v.* Glover, 3 G. Greene, 387; Lessee of Paine *v.* Mooreland, 15 Ohio, 436; Root *v.* Columbus, H. V. & T. R. Co., 45 Ohio St. 222; 12 N. E. Rep. 812.

[2] Cooper *v.* Reynolds, 10 Wall. 308.

[3] *Ante*, sec. 14.

[4] Dorrier *v.* Masters, 83 Va. 459; 2 S. E. Rep. 927; Reed *v.* Maben, 21 Neb. 696; 33 N. W. Rep. 252.

[5] Kruse *v.* Wilson, 79 Ill. 233.

[6] Robertson *v.* Hoge, 83 Va. 124; 1 S. E. Rep. 667; Offterdinger *v.* Ford, 86 Va. 917; 12 S. E. Rep. 1.

[7] *Ante*, sec. 14; McKinney *v.* Collins, 88 N. Y. 216; Lutz *v.* Kelly, 47 Ia. 310; Miller *v.* Dungan, 36 N. J. Law, 21; Kenney *v.* Georgen, 36 Minn. 190; 31 N. W. Rep. 210.

[8] *Ante*, sec. 14; Root *v.* Columbus, H. V. & T. R. Co., 45 Ohio St. 222; 12 N. E. Rep. 812.

the court such jurisdiction as will authorize a final judgment in any form.[1] Where a statute requires the writ to be served within a specified time, the fact that the defendant has prevented service within the time by concealing himself is immaterial. If service is not made as required, the writ must be quashed.[2] As to what will amount to a sufficient levy, see cases cited below.[3] And also the proof of such levy.[4]

In some of the states, personal service of the attaching papers is required to be made on the defendant.[5] But such personal service may be waived, by the debtors absconding, or otherwise.[6] Where there is no personal service on, or appearance by, the defendant, conditions subsequent to the levy of the writ are held to be jurisdictional, and a failure to comply with such conditions is held to render a judgment by default absolutely void.[7]

6. *Service of process on the defendant.* The proper issuance and levy of the writ will, as we have seen, give the court jurisdiction of the subject-matter. But in order to authorize the court to proceed to a final judgment, and a disposition of the property attached, notice, in the manner provided by law, must be given to the defendant.[8]

[1] *Ante*, sec. 14; Drake Attach., secs. 436, 437; Lutz *v.* Kelly, 47 Ia. 309; Darrance *v.* Preston, 18 Ia. 396.

[2] Luding *v.* Blum, 18 N. Y. Supl. 69.

[3] Dorrier *v.* Masters, 83 Va. 459; 2 S. E. Rep. 927; Winner *v.* Hoyt, 68 Wis. 278; 32 N. W. Rep. 128; Root *v.* Columbus, H. V. & T. R. Co., 45 Ohio St. 222; 12 N. E. Rep. 812; Hibbard *v.* Zenor, 75 Ia. 471; 39 N. W. Rep. 714; Blake *v.* Rider, 36 Kan. 693; 14 Pac. Rep. 280; Gumbel *v.* Pitkin, 124 U. S. 131; 8 Sup. Ct. Rep. 379; Barney *v.* Rockwell, 60 Vt. 444; 15 Atl. Rep. 163; Buehler *v.* De Lemos, 84 Mich. 554; 48 N. W. Rep. 42; Offterdinger *v.* Ford, 86 Va. 917; 12 S. E. Rep. 1; Armour Bros. Banking Co. *v.* Smith, 20 S. W. Rep. 690.

[4] White *v.* O'Bannon, 86 Ky. 93; 5 S. W. Rep. 346; Offterdinger *v.* Ford, 86 Va. 917; 12 S. E. Rep. 1; 1 Am. & Eng. Enc. of Law, 921; Ahern *v.* Purnell, 62 Conn. 21; 25 Atl. Rep. 393.

[5] Thomas *v.* Richards, 69 Wis. 671; 35 N. W. Rep. 42; Lehman *v.* Broussard, 12 Sou. Rep. 504.

[6] Thomas *v.* Richards, 69 Wis. 671; 35 N. W. Rep. 42.

[7] Steere *v.* Vanderberg, 67 Mich. 530; 35 N. W. Rep. 110.

[8] *Ante*, sec. 33; Drake Attach., secs. 5, 436, 437, 446b; Haywood *v.* McCrory, 33 Ill. 459; Jarvis *v.* Barrett, 14 Wis. 591; Haywood *v.* Collins, 60

Usually, personal service is required where the defendant is a resident, but not always. Where a certain time is given by statute within which to make personal service, after which constructive notice is authorized, constructive notice before the full time for personal service has expired is void.[1]

The federal courts have no jurisdiction in suits founded on foreign attachment without personal service of process.[2]

If the defendant is a non-resident, constructive service is authorized.[3] And in some of the states, no summons need issue, publication of notice being authorized on a showing of non-residence by the affidavit.[4] So, where it is shown that by concealment or otherwise the defendant is avoiding the personal service of process.[5]

Sometimes service on the defendant is required to be made within a specified time after the issuance of the writ of attachment. This is a condition that must be performed in order to uphold the writ. Therefore, if it is not complied with, the writ becomes void.[6]

The effect of personal and constructive service is different. In case of personal service, a personal judgment may be rendered against the defendant, binding upon him and all of his property.[7] If the service is constructive, the court has no power to render a personal judgment against a non-resident, or, if the judgment is personal in

Ill. 328; Wescott *v.* Archur, 12 Neb. 345; 11 N. W. Rep. 491; Foyles *v.* Kelso, 1 Blkf. (Ind.) 215; Waples Attach. 321 et seq.; Lackett *v.* Rumbaugh, 45 Fed. Rep. 23; Woolkins *v.* Haid, 49 Mich. 299; 13 N. W. Rep. 598; McKinney *v.* Collins, 88 N. Y. 216; Lutz *v.* Kelly, 47 Ia. 310; Darrance *v.* Preston, 18 Ia. 396; Drake Attach., secs. 436, 437; Fisk *v.* Reigelman, 75 Wis. 499; 43 N. W. Rep. 1117; Martin *v.* Central Vermont R. Co., 3 N. Y. Supl. 82.

[1] Hubbell *v.* Rhinesmith, 85 Mich. 30; 48 N. W. Rep. 178.

[2] Perkins *v.* Hendryx, 40 Fed. Rep. 657; Toland *v.* Sprague, 12 Pet. 300.

[3] *Ante*, sec. 14; Jarvis *v.* Barrett, 14 Wis. 591; Haywood *v.* Collins, 60 Ill. 328; Darrance *v.* Preston, 18 Ia. 396.

[4] Wescott *v.* Archur, 12 Neb. 345; 11 N. W. Rep. 491.

[5] Thomas *v.* Richards, 69 Wis. 671; 35 N. W. Rep. 42.

[6] Rhode Island, etc., Co. *v.* Keeney, 48 N. W. Rep. 341; McLaughlin *v.* Wheeler, 50 N. W. Rep. 834; Union Distilling Co. *v.* Ruser, 16 N. Y. Supl. 50; Jones *v.* Warnick, 49 Kan. 63; 30 Pac. Rep. 115.

[7] *Ante*, secs. 35, 36, 37, 38.

form, it can have no effect other than to subject the property attached to sale for the satisfaction of the plaintiff's claim.[1]

Whether, in case of an insufficient service the proceedings are absolutely void, and a title obtained by a sale of the property subject to collateral attack, there is a disagreement in the decided cases.[2] It has frequently been held that a seizure of the property gives jurisdiction, and that, therefore, the title of a purchaser can not be defeated in a collateral proceeding by showing a failure to give notice to the defendant.[3] But the better rule seems to be that a failure to notify the defendant renders the proceeding void and a sale under it invalid.[4] Such is the rule in other cases where notice is required. And the fact that property has been attached ought not to change the rule.[5]

The discrepancy between the decisions of the federal and state courts on this subject arises, apparently, from the fact that the former do not regard the making of the affidavit and giving notice as jurisdictional, while the state courts have almost uniformly taken a different view of it and held that they are jurisdictional.[6] The different kinds of service of process, and how made and proved in gen-

[1] *Ante*, sec. 14; Drake Attach., sec. 437; Clymore *v.* Williams, 77 Ill. 618; Lackett *v.* Rumbaugh, 45 Fed. Rep. 23; McKinney *v.* Collins, 88 N. Y. 216, Lutz *v.* Kelly, 47 Ia. 310; Darrance *v.* Preston, 18 Ia. 396; Miller *v.* Dungan, 36 N. J. Law, 21; Fitzsimmons *v.* Marks, 66 Barb. (N. Y.) 333; Kenney *v.* Goergen, 36 Minn. 190; 31 N. W. Rep. 210; Anderson *v.* Goff, 72 Cal. 65; 13 Pac. Rep. 73; Pennoyer *v.* Neff, 95 U. S. 714.

[2] Drake Attach., secs. 447, 448; 1 Am. & Eng. Enc. of Law, 935.

[3] Cooper *v.* Reynolds, 10 Wall. 308; Mathews *v.* Densmore, 109 U. S. 216; 3 Sup. Ct. Rep. 126; Lessee of Paine *v.* Mooreland, 15 Ohio, 436; Beech *v.* Abbott, 6 Vt. 586; Berrien *v.* Rogers, 43 Fed. Rep. 467; Mohr *v.* Manierre, 101 U. S. 417.

[4] Warner *v.* Webster, 13 Ohio, 505; Haywood *v.* Collins, 60 Ill. 328; Vairin *v.* Edmonson, 5 Gil. (Ill.) 270; Clymore *v.* Williams, 77 Ill. 618; Wescott *v.* Archur, 12 Neb. 345; 11 N. W. Rep. 491; Mathews *v.* Densmore, 43 Mich. 461; 5 N. W. Rep. 669; Waples Attach. 321 et seq.; Borders *v.* Murphy, 78 Ill. 81; McKinney *v.* Collins, 88 N. Y. 216; Brown *v.* Carroll, 16 R. I. 604, 18 Atl. Rep. 283; Anderson v. Coburn, 27 Wis. 558.

[5] *Ante*, secs. 32, 33.

[6] Berrien *v.* Rogers, 43 Fed. Rep. 467; Erstein *v.* Rothschild, 22 Fed. Rep. 61; Waples Attach., 321 et seq.

eral, have received attention elsewhere.[1] And the rules there laid down apply to attachment proceedings.[2] The difference between no service and defective or insufficient service as to its effect upon the jurisdiction of the court in case of a collateral attack, which has been heretofore pointed out, should not be overlooked in this connection.[3]

Sometimes the writ of attachment is the only process provided for and serves as a summons. In such cases, if the writ is quashed, the whole proceeding falls. The writ can not be upheld as a summons and give jurisdiction to render a personal judgment.[4] Sometimes personal service of the writ of attachment and other papers is required.[5] But, generally, where the defendant is personally served in the main action, no personal service of the papers in the attachment proceedings is necessary. The service of the summons gives jurisdiction of his person, and the levy of the writ of attachment gives jurisdiction of the property.[6]

If the summons in the main action is required to be returned within a certain time, in order to give the court jurisdiction, the jurisdiction in the attachment proceeding lapses by a failure to make such return within the time.[7]

7. *Proof of service of process.*—The jurisdiction of the court does not depend upon the proof of service but upon the fact that service was made.[8] But where the validity of the judgment depends upon the proof of the fact, service must be proved in the manner required by the statute.[9] How the proof may be made and its effects have been considered in another place.[5]

[1] *Ante*, secs. 35–39.

[2] Vairin *v.* Edmonson, 5 Gil. (Ill.) 270.

[3] *Ante*, secs. 13, 22, 23, 36, 40; Gregg *v.* Thompson, 17 Ia. 107; 1 Am. & Eng. Enc. of Law, 935, 936.

[4] Kingsbury *v.* Borland, 64 Mich. 59; 31 N. W. Rep. 620.

[5] Thomas *v.* Richards, 69 Wis. 671; 35 N. W. Rep. 42.

[6] Bailey *v.* Valley Nat'l Bank, 127 Ill. 332; 19 N. E. Rep. 695.

[7] Brown *v.* Carroll, 16 R. I. 604; 18 Atl. Rep. 283.

[8] *Ante*, sec. 39.

[9] Haywood *v.* Collins, 60 Ill. 328; Vairin *v.* Edmonson, 5 Gil. (Ill.) 270; Cariker *v.* Anderson, 27 Ill. 358; Clymore *v.* Williams, 77 Ill. 618; Foyles *v.* Kelso, 1 Blkf. (Ind.) 215.

8. *Waiver of defects in the proceedings.*—The defendant will, by a general appearance to the action, waive all defects in the notice to him or an entire failure to give such notice.[1] So, if he appears to the proceeding in attachment, he thereby waives defects in such proceedings,[2] and by appearing and objecting on certain grounds others which might have been urged are waived.[3] But an appearance and waiver of notice to the defendant does not necessarily waive essential defects in the jurisdictional proceedings resulting in the attachment.[4]

It would seem on principle that an appearance to the main action could not have the effect to cure defects in the proceedings to acquire jurisdiction of the subject-matter, and which are by statute made conditions precedent to and necessary to vest jurisdiction in the court.[5]

[1] Drake Attach., sec. 446a; Van Diver *v.* Buckley, 1 Sou. Rep. 633; Tuller *v.* Beck, 15 N. E. Rep. 396.

[2] Blackwood *v.* Jones, 27 Wis. 498; First National Bank *v.* Greenwood, 48 N.W. Rep. 421; Roy *v.* Union Mercantile Co., 26 Pac. Rep. 996; Drake Attach., sec. 446a; Williams *v.* Stewart, 3 Wis. 773.

[3] Hillyer *v.* Biglow, 47 Kan. 473; 28 Pac. Rep. 150.

[4] Wade Attach., sec. 72; Lackett *v.* Rumbaugh, 45 Fed. Rep. 23; Steen *v.* Norton, 45 Wis. 412; Noyes *v.* Canady, 30 Fed. Rep. 665; Drake Attach., sec. 446a.

[5] Lackett *v.* Rumbaugh, 45 Fed. Rep. 23; Steen *v.* Norton, 45 Wis. 412; Noyes *v.* Canady, 30 Fed. Rep. 665.

"No express waiver of a want of summons appears of record, and there was no pleading to the complaint. The general appearance of defendant waived his personal privilege of being sued only in his own district, and it would have waived defect of merely irregular process, if any had been issued; but it does not and can not waive matters relating to the jurisdictional power of the court. Houston *v.* Porter, *supra;* Creighton *v.* Kehr, 20 Wall. 8; Harkness *v.* Hyde, 98 U. S. 476; Cooley Const. Lim. 378. When the defendant entered an appearance he by implied consent became a party, at that time, to the pending action. His appearance was merely equivalent to the service of process to commence a new action, and did not by relation revive a suit that the law had determined to be at an end. Jurisdiction generally operates for present and prospective purposes, and only in a few instances has a retroactive effect. A court may at a subsequent term, by a *nunc pro tunc* order, amend its records so as to make them speak the truth, and may allow amendments of mere irregularities or mistakes in proceedings over which it

It has been held, however, that if a defendant voluntarily appears to the action, pending publication of notice, and consents that the publication cease, he thereby waives the full publication necessary to give the court jurisdiction over the attachment proceedings.[1] And a general appearance in the main action has been given the effect of waiving the insufficiency of an essential defect in the affidavit.[2] A defect in the affidavit, not rendering it void, is waived by a failure to make objection to it at the proper time.[3]

Where conditions subsequent to the levy are required to be complied with, as, for example, personal service of the attaching papers on the defendant, the levy confers jurisdiction and the subsequent conditions may be waived.[4]

It is said, generally, that "any thing may be waived by the defendant, which is substantially no injustice to the other creditors, or is not intended to guard their rights."[5] So it is held that, as the giving of an undertaking or bond is for the benefit of the defendant alone, he may waive it, and that a failure to give it is a mere irregularity not affecting the jurisdiction of the court.[6]

had jurisdiction, but can not supply a want of jurisdiction as to previous action. Even a legislative statute can not make valid the proceedings of a court which were void for want of jurisdiction over the parties. Cooley Const. Lim. 107, 283. In issuing the warrant of attachment in this case, and making an order of publication to give validity to the proceedings, the clerk acted without authority of law, and contrary to law." Lackett *v.* Rumbaugh, 45 Fed. Rep. 23, 31.

[1] Tuller *v.* Beck, 15 N. E. Rep. 396.

[2] Blackwood *v.* Jones, 27 Wis. 498; Van Diver *v.* Buckley, 1 Sou. Rep. 633; Gunn Hardware Co. *v.* Deneson, 83 Mich. 40; 46 N. W. Rep. 940; Barnett *v.* Rayburn, 16 S. W. Rep. 537; Bollinger *v.* Gallagher, 144 Pa. St. 205; 22 Atl. Rep. 815; Dunn *v.* Crocker, 22 Ind. 324.

[3] Landfair *v.* Lowman, 50 Ark. 446; 8 S. W. Rep. 188; Horton *v.* Miller, 84 Ala. 537; 4 Sou. Rep. 370.

[4] Thomas *v.* Richards, 69 Wis. 671; 35 N. W. Rep. 42. But see, as to the effect of a failure to comply with subsequent conditions in case of a judgment by default, Steere *v.* Vanderberg, 67 Mich. 530; 35 N. W. Rep. 110.

[5] Ward *v.* Howard, 12 Ohio St. 158, 161; Root *v.* Columbus, H. V. & T. R. Co., 45 Ohio St. 222; 12 N. E. Rep. 812.

[6] O'Farrell *v.* Stockman, 19 Ohio St. 296; Root *v.* Columbus, H. V. & T. R. Co., 45 Ohio St. 222; 12 N. E. Rep. 812.

The giving of a delivery bond has been held in some cases to be a waiver of defects in the prior proceedings.[1] So of an agreement that the property attached may be sold and the proceeds held by the sheriff.[2] A motion to vacate an attachment is not waived by filing affidavits controverting the facts alleged as a ground for the issuance of the writ.[3] A special appearance may be entered to question the jurisdiction of the court, and thus avoid a waiver of defects.[4]

9. *Amendments.* In some of the states, there are special statutory provisions authorizing amendments of the proceedings in attachment, including the affidavit,[5] and the filing of a new affidavit or bond is permitted.[6] The right to amend is not confined to matters of form, in some of the states, but is allowed as to matters of substance.[7] In others, amendments as to matters of form only are allowed.[8] In others, general provisions authorizing amendments are held to apply to such proceedings, while in others the right to amend any of the proceedings necessary to give jurisdiction in case of an omission of any of the essential requirements is wholly denied.[9]

In the federal courts, amendments are allowed where essential averments are omitted from the affidavit, and that where the statute of the state as construed by the state court does not authorize such amendments.[10] But

[1] New Haven Lumber Co. *v.* Raymond, 76 Ia. 225; 40 N. W. Rep. 820.

[2] Wickham *v.* Nalty, 41 La. Ann. 284; 6 Sou. Rep. 123.

[3] Salmon *v.* Mills, 49 Fed. Rep. 333.

[4] Fremont Cultivator Co. *v.* Fulton, 103 Ind. 393; 3 N. E. Rep. 135.

[5] Campbell *v.* Whetstone, 3 Scam. (Ill.) 361; Kruse *v.* Wilson, 79 Ill. 233; Musgrove *v.* Mott, 90 Mo. 107; 2 S. W. Rep. 214; Booth *v.* Reese, 26 Ill. 45; Burnett *v.* McCluey, 92 Mo. 230; 4 S. W. Rep. 694; Richards *v.* Bestor, 90 Ala. 352; 8 Sou. Rep. 30; Salmon *v.* Mills, 49 Fed. Rep. 333.

[6] Booth *v.* Rees, 26 Ill. 45; Bailey *v.* Valley Nat'l Bank, 127 Ill. 332; 19 N. E. Rep. 695; Dalsheimer *v.* McDaniel, 12 Sou. Rep. 338.

[7] Richards *v.* Bestor, 90 Ala. 352; 8 Sou. Rep. 30; Sheldon *v.* Kivett, 110 N. Car. 408; 14 S. E. Rep. 970.

[8] East, etc., Lumber Co. *v.* Warren, 78 Tex. 318; 14 S. W. Rep. 783.

[9] Wade Attach., sec. 3; Winters *v.* Pearson, 72 Cal. 553; 14 Pac. Rep. 304; Freer *v.* White, 91 Mich. 74; 51 N. W. Rep. 807.

[10] Erstein *v.* Rothschild, 22 Fed. Rep. 61; Tilton *v.* Cofield, 93 U. S. 163.

there must be something to amend. Therefore, if the affidavit is void, and not merely voidable, it can not be amended.[1] An affidavit can not be so amended as to add a new cause for attachment which existed when the same was made.[2] The return of an officer may be amended to conform to the facts.[3]

10. *How sufficiency of proceedings may be tested.* The sufficiency of the proceedings may be tested in different ways. If the defect appears on the face of any of the proceedings, a motion to quash the writ is proper,[4] or a motion to dismiss the proceeding.[5] If the proceedings are regular on their face, and it is claimed that any of the facts appearing therefrom do not exist, a motion to quash, supported by proof by affidavit or otherwise, may be resorted to. In such cases, the question to be tried is one of fact, however the question may be raised. And to disprove the existence of the grounds of attachment is to defeat the jurisdiction.[6] And upon such issue the burden is upon the plaintiff, and he must prove the allegations set forth in his affidavit, or enough of them to support the attachment.[7] But no allegation or fact going to the merits of the action can be considered on a motion to dissolve.[8]

A plea in abatement is proper.[9] In some of the states

[1] Swearingen *v.* Howser, 37 Kan. 126; 14 Pac. Rep. 436; Wagener *v.* Booker, 31 S. Car. 375; 9 S. E. Rep. 1055; Moore *v.* Neill, 12 S. E. Rep. 222.

[2] Brookmere *v.* Rosa, 34 Neb. 227; 51 N. W. Rep. 840.

[3] Downs *v.* Flanders, 150 Mass. 92; 22 N. E. Rep. 585.

[4] 1 Am. & Eng. Enc. of Law, 931.

[5] Loeb *v.* Smith, 78 Ga. 504; 3 S. E. Rep. 458.

[6] *Ante*, sec. 14; Fiske *v.* Anderson, 33 Barb. (N. Y.) 71; Seville *v.* Wagner, 46 Ohio St. 52; 18 N. E. Rep. 430.

[7] Seville *v.* Wagner, 46 Ohio St. 52; 18 N. E. Rep. 430; Kuehn *v.* Paroni, 20 Nev. 203; 19 Pac. Rep. 273; Becker *v.* Langford, 39 Kan. 35; 17 Pac. Rep. 648.

[8] Olmsted *v.* Rivers, 9 Neb. 234; 2 N. W. Rep. 366; Hermann *v.* Amedee, 30 La. Ann. 393; Kuehn *v.* Paroni, 20 Nev. 203; 19 Pac. Rep. 273.

[9] Horton *v.* Miller, 84 Ala. 537; 4 Sou. Rep. 370; Stadder *v.* Jacobs, 12 Sou. Rep. 444.

issues are regularly formed in the attachment proceedings, where the question is one of fact and tried with the main action.[1] Sometimes the defect can only be reached by a rule on the plaintiff to show cause why the writ should not be dissolved.[2] A court of equity has jurisdiction to set aside an attachment on the ground of fraud in making the affidavit.[3]

Whatever the mode of attack may be, it must be made before final judgment in the action under the practice usually prevailing in the different states, for the reason that the attachment has, upon the final judgment being rendered in favor of the plaintiff, served its purposes.[4] But where a separate issue has been made, pending the main action, upon the facts alleged in support of the attachment, a judgment in favor of the plaintiff, in the action,

[1] Prunk *v.* Williams, 28 Ind. 523; Dunn *v.* Crocker, 22 Ind. 324.

[2] Adair *v.* Stone, 81 Ala. 113; 1 Sou. Rep. 768.

[3] Byles *v.* Rowe, 64 Mich. 522; 31 N. W. Rep. 463.

[4] Reed *v.* Maben, 21 Neb. 696; 33 N. W. Rep. 252.

"Attachment is a proceeding ancillary to the main action, in which it is allowed. If the main action is attacked and overthrown, the attachment goes with it. On the other hand, it often happens that, while the cause of action is lawful and just, the ground of attachment is mistaken or false; hence judgment must be rendered for the plaintiff on the merits, but the attachment must be dissolved. As a matter of practice, however, if no ground of attachment exists, or the order has been issued without the proper affidavit or bond as required by statute, the attention of the court must be called thereto in some appropriate manner, and the question of sufficiency settled before the final judgment in the case. The sole object of an attachment is that the property of the debtor may be taken into the custody of law and preserved, so that it may be applied to the payment of the judgment of the plaintiff when obtained. It therefore follows that, when this proceeding has answered its purpose, it would be idle to go back and inquire into its sufficiency. Under the system of practice which formerly prevailed in some of the states, where actions were commenced by attachment, it has been held that when, upon the final trial, it appeared from the pleadings or evidence in the case, it was one not proper to be commenced by attachment, the cause would be dismissed. See Elliott *v.* Jackson, 3 Wis. 649.

"But this rule is not applicable to our present system of practice, where, as above stated, the order of attachment is an ancillary proceeding." Reed *v.* Maben, 21 Neb. 696; 33 N. W. Rep. 252, 253.

does not deprive the defendant of the right to a determination of the issues as to the attachment thereafter.[1]

In some of the states it is provided by statute that a motion to set aside an attachment must be made within a certain time; for example, before the expiration of the time to answer. If so the motion must be made within the time or it is waived.[2] Proceedings in attachment can not be attacked, collaterally, for mere irregularities.[3]

11. *Presumptions in favor of jurisdiction.*—There are authorities holding that attachment proceedings are special, that the jurisdiction of the court must therefore appear affirmatively, and that no presumptions in favor of such jurisdiction can be indulged.[4] But the clear weight of authority and reason is to the contrary, the better rule being that in the absence of any showing in the record to the contrary, it will be presumed that the steps necessary to vest the court with jurisdiction were taken and that the court had authority to act.[5]

75. Garnishment.—The principles affecting jurisdiction in garnishment proceedings are very similar to those applicable to proceedings in attachment, which have been treated of in the last preceding section, and the objects of the two are very similar. The attachment is to seize and hold the property of the defendant, subject to execution, for the satisfaction of the plaintiff's judgment when recovered.[6] The object of the garnishment proceeding is to compel one indebted to the defendant, or having property of his, to withhold the same and pay it into court or deliver it to the proper officer to be applied to the satisfaction of the judgment when recovered.[7]

The most material distinction between the two, as re-

[1] Ray *v.* Gore, 41 N. W. Rep. 329; Calvert Lith. Co. *v.* K. & K. Medical Ass'n, 61 Mich. 336; 28 N. W. Rep. 111.

[2] Vaughn *v.* Dawes, 7 Mont. 360; 17 Pac. Rep. 114.

[3] Morey *v.* Hoyt, 62 Conn. 542; 26 Atl. Rep. 127.

[4] Oberfelder *v.* Kavanaugh, 32 N. W. Rep. 295.

[5] *Ante*, sec. 25; Veatch *v.* Chenoweth, 46 Kan. 743; 30 Pac. Rep. 118; Beebee *v.* Morrell, 76 Mich. 114; 42 N. W. Rep. 1119.

[6] *Ante*, sec. 74.

[7] Benton *v.* Snyder, 22 Minn. 247.

spects the subject of jurisdiction, is that in the former a seizure of the property is authorized, and is sometimes absolutely necessary to give the court jurisdiction,[1] while in the latter the seizure of the property is neither necessary nor authorized.[2]

The garnishment proceeding is like the attachment in that it is ancillary to the main action,[3] that notice to the defendant is necesary to uphold it,[4] and that a valid judgment in the main action, authorizing the application of the property in the hands of the garnishee to the satisfaction of the plaintiff's claim must be recovered;[5] but not necessarily a personal judgment against the defendant. The only jurisdiction obtained by the court, where the defendant is a non-resident, may rest entirely upon the proceeding in garnishment, and constructive notice, which will not authorize a personal judgment, but only the disposition of the property or fund in the hands of the garnishee.[6] In such case the proceeding is essentially one *in rem*.[7] And in some of the states, the validity of the garnishee proceeding depends upon a valid proceeding in attachment under some circumstances.[8]

A real contest may arise between the plaintiff and the garnishee as to the indebtedness of the latter to the defendant, or as to the ownership of the defendant of the property sought, in his hands, to be applied to the plaintiff's

[1] *Ante*, sec. 74.

[2] Wade Attach., sec. 325.

[3] Wade Attach., sec. 399; Benton *v.* Snyder, 22 Minn. 247; Frisk *v.* Reigelman, 75 Wis. 499; 43 N. W. Rep. 1117; Streissguth *v.* Reigelman, 75 Wis. 212; 43 N. W. Rep. 1116.

[4] Wade Attach., sec. 399; Newman *v.* Manning, 89 Ind. 422; Martin *v.* Central Vermont R. Co., 3 N. Y. Supl. 82; Beaupre *v.* Keefe, 79 Wis. 446; 48 N. W. Rep. 596; Debbs *v.* Dalton, 34 N. E. Rep. 236.

[5] Wade Attach., sec. 399; Waples Attach. 345; Wilder *v.* Weatherhead, 32 Vt. 765; Melloy *v.* Burtis, 124 Pa. St. 161; 16 Atl. Rep. 747; Frisk *v.* Reigelman, 75 Wis. 499; 43 N. W. Rep. 1117; Streissguth *v.* Reigelman, 75 Wis. 212; 43 N. W. Rep. 1116; Debbs *v.* Dalton, 34 N. E. Rep. 236.

[6] Waples Attach. 345.

[7] *Ante*, sec. 74; Waples Attach. 345.

[8] Streissguth *v.* Reigelman, 75 Wis. 212; 43 N. W. Rep. 1116; Scurlock *v.* Gulf C. & S. F. Ry. Co., 77 Tex. 478; 14 S. W. Rep. 148; Donald *v.* Nelson, 10 Sou. Rep. 317.

claim. And as to these questions, the controversy assumes the form of an independent suit, and is so treated for certain purposes.[1] But for all that, the action against the defendant and the recovery of a judgment against him, or for the application of the property, are necessary to uphold the proceeding in garnishment, or any decree that may be rendered against him. The proceeding is entirely statutory.[2]

Usually an affidavit in addition to the affidavit for attachment is required. The statutes of the different states differ as to what these affidavits shall contain. The statute must be complied with.[3]

It will be unnecessary in this connection to consider the question as to what will amount to a sufficient affidavit. What has been said with reference to the affidavit for attachment will suffice for the present purpose for the reason that the general principles affecting the two are so nearly the same as to render a separate discussion of them superfluous. But, for convenience of reference, some of the authorities bearing upon the sufficiency of affidavits for garnishment have been gathered in the foot note.[4]

The same may be said with reference to the bond or undertaking where an additional bond is required by the statute. Although, generally, the garnishee is not interested in the bond, and a failure to comply with the statute respecting it can not be objected to by him for the reason that he is usually a disinterested party to the controversy, and does not need the protection of the bond.[5]

[1] Wade Attach., sec. 332; Middleton Paper Co. *v.* Rock River Paper Co., 19 Fed. Rep. 252.

[2] Wade Attach., sec. 333.

[3] Wade Attach., sec. 356; Steen *v.* Norton, 45 Wis. 412; Wells *v.* American Ex. Co., 55 Wis. 23; 11 N. W. Rep. 537.

[4] Wade Attach., sec. 356; Steen *v.* Norton, 45 Wis. 412; Wells *v.* American Ex. Co., 55 Wis. 23; 11 N. W. Rep. 537; Ettelsohn *v.* Fireman's Fund Ins. Co., 31 N. W. Rep. 201; Scurlock *v.* Gulf C. & S. F. Ry. Co., 77 Tex. 478; 14 S. W. Rep. 148; Connor *v.* Third National Bank, 90 Mich. 328; 51 N. W. Rep. 523; Orton *v.* Noonan, 27 Wis. 572; Everdell *v.* The Sheboygan, etc., R. Co., 41 Wis. 395; Davis *v.* Wilson, 3 N. W. Rep. 52; Prince *v.* Heenan, 5 Minn. 347.

[5] Wade Attach., sec. 356.

As to the necessity for such notice to the defendant, in the main action, as will give the court jurisdiction, and thereby uphold the auxiliary proceeding in garnishment, the rules and principles are the same as in attachment.[1] And in lieu of the seizure of the property in attachment, notice in the form provided by statute must be given to the garnishee.[2] This notice is in the nature of an actual levy upon the property, in that the garnishee is bound, upon receiving it, to hold the property, or the amount due from him to the defendant, subject to any judgment that the plaintiff may recover in the main action.[3]

From the time notice is given to the garnishee the property or chose in action is in the custody of the law, the same, in legal effect, as if an actual levy had been made thereon. The notice given to the garnishee may also be in the form of a summons to him to appear and answer as to the garnishment proceeding. As to the form and sufficiency of the notice, see the authorities cited below.[4] Also as to the time and manner of its service.[5]

The doctrine of waiver of notice on the part of the garnishee differs from the rule on the subject in attachment proceedings, growing out of the fact that the garnishee is not, as a rule, a real party in interest who can waive the notice.

[1] *Ante*, sec. 74. [2] Padden *v.* Moore, 58 Ia. 703; 12 N. W. Rep. 724.

[3] Waples Attach. 341; Wilder *v.* Weatherhead, 32 Vt. 765; Beamer *v.* Winter, 41 Kan. 596; 21 Pac. Rep. 1078.

[4] Wade Attach., sec. 357; Padden *v.* Moore, 58 Ia. 703; 12 N. W. Rep. 724; Mathews *v.* Smith, 13 Neb. 178; 12 N. W. Rep. 821; Bell *v.* Wood, 87 Ky. 56; 7 S. W. Rep. 550; Warner *v.* Fourth Nat'l Bank, 115 N. Y. 251; 22 N. E. Rep. 172; Mangold *v.* Dooley, 89 Mo. 111; 1 S. W. Rep. 126; Acme Lumber Co. *v.* Francis Vandergrift Shoe Co., 11 Sou. Rep. 657; Middleton Paper Co. *v.* Rock River Paper Co., 19 Fed. Rep. 252.

[5] Wade Attach., secs. 359, 360; Gates *v.* Tusten, 89 Mo. 13; 14 S. W. Rep. 827; Hayden *v.* National Bank, 29 N. E. Rep. 143; First Nat'l Bank *v.* Leppel, 9 Colo. 594; 13 Pac. Rep. 776; Nelson *v.* Sanborn, 64 N. H. 310; 9 Atl. Rep. 721; Harrell *v.* Mexico Cattle Co., 73 Tex. 612; 11 S.W. Rep. 863; Tweedy *v.* Bogart, 56 Conn. 419; 15 Atl. Rep. 374; Fuller *v.* Foote, 56 Conn. 341; 15 Atl. Rep. 760; Case *v.* Noys, 16 Ore. 539; 21 Pac. Rep. 46; Axman *v.* Dueker, 45 Kan. 179; 26 Pac. Rep. 946; Gow *v.* Marshall, 90 Cal. 565; 27 Pac. Rep. 422.

Therefore, unless expressly authorized to do so by statute, he can not waive notice or acknowledge service of the same.[1] Nor can he waive the making of the affidavit required by the statute.[2] But he may waive defects in the proceedings affecting himself alone and not going to the jurisdiction of the court.[3] The defendant may waive notice or defects therein affecting jurisdiction over his person, thereby making a jurisdictional foundation for the garnishee proceeding.[4]

There is nothing peculiar about the proof of service of process in garnishee proceedings that calls for any especial consideration. The proof must, as in other cases, show that service has been made as required by the statute.[5]

With reference to the jurisdiction as to amount, it is usually held that the amount claimed by the plaintiff in the main action controls, and not the value of the property in the hands of the garnishee or the amount claimed to be due from him to the defendant.[6] But in some of the states a different rule prevails. The garnishment proceeding is treated as an independent action, in this respect, between the plaintiff and the garnishee, and the amount claimed to be in the hands of the garnishee is held to control.[6]

As to the question of territorial jurisdiction, the proceeding must necessarily be brought in the court having jurisdiction of the place where the property is situate or the garnishee, who is alleged to be indebted to the defendant, resides.[7] But provision may be made for garnishment

[1] Wade Attach., sec. 361; Ettelsohn *v.* Fireman's Fund Ins. Co., 64 Mich. 331; 31 N. W. Rep. 201; Rindge *v.* Green, 52 Vt. 204; McCormick Harvesting, etc., Co. *v.* James, 54 N. W. Rep. 1088; Nelson *v.* Sanborn, 64 N. H. 310; 9 Atl. Rep. 721.

[2] Steen *v.* Norton, 45 Wis. 412; Wells *v.* American Ex. Co., 55 Wis. 23; 11 N. W. Rep. 537; Ettelsohn *v.* Fireman's Fund Ins. Co, 31 N. E. Rep. 201.

[3] Wade Attach., sec. 386; Stevens *v.* Dillman, 86 Ill. 233.

[4] Wade Attach., sec. 362. [5] Wade Attach., sec. 363.

[6] Wade Attach., sec. 391.

[7] Wade Attach., sec. 391; Becknell *v.* Becknell, 110 Ind. 42; 10 N. E. Rep. 414; Bowen *v.* Pope, 125 Ill. 28; 17 N. E. Rep. 64; Berry *v.* Davis, 77 Tex. 191; 13 S. W. Rep. 978; Harvey *v.* Great Northern Ry. Co., 52

proceedings against foreign corporations doing business within the state and having property of the defendant in their possession within the jurisdiction.[1]

The most satisfactory rule with reference to proceedings against a debtor of the defendant is that they may be maintained wherever the defendant might sue for the debt, provided the law of the forum authorizes the proceeding.[2] And this would seem to authorize the proceeding against a foreign corporation wherever it could, by the law of the state where it is doing business, be sued and served. But it has been ruled differently.[3]

A non-resident garnishee can not be reached by constructive service, or otherwise, so long as he remains out of the state.[4] The non-residence of the plaintiff, or of the defendant, or the fact that the debt was contracted out of the state, will not deprive the court of jurisdiction if property in the hands of the garnishee is found.[5]

In order to authorize the proceeding, there must be property within the jurisdiction of the court which is subject to execution, and in some of the states this must be shown by the affidavit.[6] Therefore, if the property levied upon in the hands of the garnishee is exempt from execution, or not subject thereto for any other reason, the jurisdiction of the court, based alone upon the presence of such property, must fail.[7]

It would be beyond the scope of this work to undertake to ascertain what property is subject to execution and

N. W. Rep. 905; Lewis *v.* Lawrence, 15 N. W. Rep. 113; Rindge *v.* Green, 52 Vt. 204; Searing *v.* Benton, 41 Kan. 758; 21 Pac. Rep. 800.

[1] Cousens *v.* Lovejoy, 81 Me. 467; 17 Atl. Rep. 495.

[2] Harvey *v.* Great Northern Ry. Co., 52 N. W. Rep. 905; Blake *v.* Williams, 6 Pick. 285.

[3] Milwaukee, etc., Works *v.* Brevoort, 73 Mich. 155; 41 N. W. Rep. 215.

[4] Wade Attach., sec. 391; Cousens *v.* Lovejoy, 17 Atl. Rep. 495.

[5] Nichols *v.* Hooper, 61 Vt. 295; 17 Atl. Rep. 134; Berry *v.* Davis, 77 Tex. 191; 13 S. W. Rep. 978; Harvey *v.* Great Northern Ry. Co., 52 N. W. Rep. 905.

[6] Steen *v.* Norton, 45 Wis. 412.

[7] Terre Haute & I. R. Co. *v.* Baker, 123 Ind. 15; 24 N. E. Rep. 83; Noble *v.* The Thompson Oil Co., 79 Pa. St. 354; 21 Am. Rep. 66.

which would be the foundation of jurisdiction in garnishment. The laws of the different states are not uniform on the subject, and a discussion of the question here would serve no useful purpose. The right of the plaintiff to maintain garnishment proceedings depends, in part, upon the question whether the defendant could himself maintain an action against the garnishee for the property or indebtedness sought to be reached. The general rule on the subject is, that a garnishment proceeding can be maintained only for such a debt or liability as the principal debtor could himself enforce by an action at law.[1]

While the garnishee is in many respects a disinterested party, he is nevertheless interested in the question of jurisdiction of the subject-matter and of the person of the defendant in the main action, for the reason that, in order to protect him from a subsequent claim against him by the defendant, or others, for the property held by him, he must see that the court has such jurisdiction as will render the judgment recovered, and upon which he is required to surrender the property, valid and binding, not only upon him, but upon the defendant as well.[2] But he can not be heard to question the judgment in the main action for mere errors or irregularities not affecting the jurisdiction of the court.[3]

In some of the states, provision is made for garnishment in aid of execution, but the proceeding thus provided for needs no special consideration in this connection. The proceeding is sometimes denominated "trustee process," or "factorizing process," but it is the same thing by a different name.

[1] Hoyt *v.* Swift, 13 Vt. 129; Searing *v.* Benton, 41 Kan. 758; 21 Pac. Rep. 800.

[2] Wade Attach., sec. 399; Melloy *v.* Burtis, 124 Pa. St. 161; 16 Atl. Rep. 747; Streissguth *v.* Reigelman, 75 Wis. 212; 43 N. W. Rep. 1116; Frisk *v.* Reigelman, 75 Wis. 499; 43 N. W. Rep. 1117; Beaupre *v.* Keefe, 79 Wis. 436; 48 N. W. Rep. 596; Dennison *v.* Taylor, 31 N. E. Rep. 148; Louisville N. A. & C. Ry. Co. *v.* Lake, 32 N. E. Rep. 590.

[3] Henny Buggy Co. *v.* Patt, 73 Ia. 485; 35 N. W. Rep. 587.

76. Sales of real estate. Questions bearing upon the subject of this section have been considered in earlier sections of this work.[1] Such questions arise most frequently in cases of sales made by executors, administrators, and guardians. The general principles affecting proceedings of this character have received attention somewhat more particularly in the section on probate jurisdiction.[2]

But it has been thought best to consider the subject more fully and minutely, in this connection. Much confusion will be found in the decided cases upon many of the questions of jurisdiction in case of sales of real estate. And in the main these differences are wholly irreconcilable. They result very largely from two causes, viz., differences in the statutes of the several states, and the disagreement of the courts of the different states as to the grade of the courts exercising the jurisdiction, whether courts of general or of special jurisdiction, when acting in proceedings of this character. In the earlier cases the great weight of authority was undoubtedly to the effect that whatever might be the grade of the court, in general, it was, when exercising powers of this kind, a court of special jurisdiction.[3] And that, therefore, the jurisdiction, or the facts necessary to establish the jurisdiction, could not be presumed, but must affirmatively appear on the face of the record.[4] And there are late cases to the same effect.[5]

In many of the states this has been changed by express statutory provisions. In others the courts have repudiated the doctrine, and hold that such proceedings are not special, in the sense that no presumptions can be indulged

[1] *Ante*, secs. 6, 7, 23, 25. [2] *Ante*, sec. 67.

[3] Root *v.* McFerrin, 37 Miss. 17; 75 Am. Dec. 49, 61 note; Wyatt *v.* Rambo, 29 Ala. 510; 68 Am. Dec. 89; Tucker *v.* Harris, 13 Ga. 1; 58 Am. Dec. 488.

[4] Wyatt *v.* Rambo, 29 Ala. 510; 68 Am. Dec. 89; Gelstrop *v.* Moore, 26 Miss. 206; 59 Am. Dec. 254; Martin *v.* Williams, 42 Miss. 210; 97 Am. Dec. 456; Goforth *v.* Longworth, 4 Ohio, 129; 19 Am. Dec. 588.

[5] Elwood *v.* Northrop, 106 N. Y. 172; 12 N. E. Rep. 590; Matter of Valentine, 72 N. Y. 184; Wilson *v.* Holt, 83 Ala. 528; 3 Sou. Rep. 321; Sloan *v.* Sloan, 25 Fla. 53; 5 Sou. Rep. 603.

in favor of the jurisdiction of the court in such cases. And the weight of the modern authorities is in favor of upholding proceedings of this kind by executors, administrators, and guardians as the exercise, by the courts, of general jurisdiction to be upheld by all the presumptions applicable to such jurisdiction.[1]

It is held, generally, that "where a probate court possesses general jurisdiction of a given class of subject-matters, the possession of jurisdiction assumed to be exercised in a particular case falling within that class is, in collateral proceedings, presumed," and that the presumption can only be rebutted by the record.[2]

But it is held that where a deed, purporting to be executed by one as guardian, is offered in evidence it must be shown that he was duly appointed such guardian by a court of competent jurisdiction, and had authority from the court to make the conveyance; and that the existence of such authority will not be presumed even after the lapse of many years.[3]

It is held in some of the cases that the facts necessary to show jurisdiction need not appear from the record, but may be shown *aliunde*.[4]

The jurisdiction to order the sale of real estate depends

[1] *Ante*, secs. 6, 7, 23, 25, 67; Schultz *v.* Schultz, 10 Grattan, 358; 60 Am. Dec. 335, 353; Schnell *v.* City of Chicago, 38 Ill. 382; 87 Am. Dec. 304; Torrance *v.* Torrance, 53 Pa. St. 505; Appeal of Hilton, 9 Atl. Rep. 434; Klingensmith *v.* Bean, 2 Watts (Penn.) 486; 27 Am. Dec. 328; McPherson *v.* Cunliff, 11 Serg. & Rawle, 422; 14 Am. Dec. 642; Davis *v.* Hudson, 29 Minn. 27; 11 N. W. Rep. 136; Camden *v.* Plain, 91 Mo. 117; 4 S. W. Rep. 86; Rowden *v.* Brown, 91 Mo. 429; 4 S. W. Rep. 129; Martin *v.* Robinson, 67 Tex. 368; 3 S. W. Rep. 550; Kelley *v.* Morrell, 29 Fed. Rep. 736; Moffitt *v.* Moffitt, 69 Ill. 641; Johnson *v.* McDyer, 9 S. W. Rep. 778; McMillan *v.* Reeves, 102 N. Car. 550; 9 S. E. Rep. 449; Murphy *v.* De France, 105 Mo. 53; 15 S. W. Rep. 949; Lyne *v.* Sanford, 82 Tex. 58; 19 S. W. Rep. 847; Harris *v.* Shafer, 21 S. W. Rep. 110; Macey *v.* Stark, 21 S. W. Rep. 1088; Withers *v.* Patterson, 27 Tex. 491; 86 Am. Dec. 643; May *v.* County of Logan, 30 Fed. Rep. 250; Simmons *v.* Saul, 138 U. S. 439; 11 Sup. Ct. Rep. 369; Shroyer *v.* Richmond, 16 Ohio St. 455.

[2] Davis *v.* Hudson, 29 Minn. 27; 11 N. W. Rep. 136; Menage *v.* Jones, 40 Minn. 254; 41 N. W. Rep. 972.

[3] House *v.* Brent, 69 Tex. 27; 7 S. W. Rep. 65.

[4] Van Deusen *v.* Sweet, 51 N. Y. 378.

upon the general power of the court to exercise such jurisdiction, upon its having acquired jurisdiction of the administration of the estate, generally, and upon its having, by the commencement of appropriate proceedings, by petition or otherwise, acquired jurisdiction of the particular property to be dealt with.[1]

It is held in some of the cases, however, that the question whether the executor, administrator, or guardian was legally appointed or not can not be raised, collaterally, as against an order or decree for the sale of real estate made by a competent court.[2]

It will be found by a reference to these cases that some of them turn upon the language of some statute which specifies, and therefore limits, the grounds upon which sales may be attacked collaterally. But in others the conclusion reached is placed upon the ground that, before the court can properly order a sale, it must necessarily determine whether the person applying for such order is the duly authorized guardian, executor, or administrator, and that such determination is conclusive on collateral attack.[3] And the rule that the question as to the validity of the appointment can not be inquired into collaterally where the court is one having jurisdiction of the general subject-matter of making such appointments, is sustained by the weight of authority.

If it appears from the record that the court never obtained jurisdiction to appoint the administrator, there can be no jurisdiction to order the sale of real estate by him.[4]

[1] Long *v.* Burnett, 13 Ia. 28; 81 Am. Dec. 420; Bloom *v.* Burdick, 1 Hill (N. Y.), 130; 37 Am. Dec. 299; Culver *v.* Hardenbergh, 37 Minn. 225; 33 N. W. Rep. 792; Paul *v.* Willis, 69 Tex. 261; 7 S. W. Rep. 357; Freeman Void Jud. Sales, sec. 9.

[2] Walker *v.* Goldsmith, 14 Or. 125; 12 Pac. Rep. 537; Davis *v.* Hudson, 29 Minn. 27; 11 N. W. Rep. 136; Clancy *v.* Stephens, 92 Ala. 577; 9 Sou. Rep. 522; Saul *v.* Frame, 22 S. W. Rep. 984; Shroyer *v.* Richmond, 16 Ohio St. 455.

[3] Clancy *v.* Stephens, 92 Ala. 577; 9 Sou. Rep. 522; Bostwick *v.* Skinner, 80 Ill. 147.

[4] Paul *v.* Willis, 69 Tex. 261; 7 S. W. Rep. 357; Withers *v.* Patterson, 27 Tex. 491; 86 Am. Dec. 643.

But where the record is silent on the subject, it will be presumed that the court had jurisdiction to appoint the administrator and that he was legally appointed.[1]

If the question goes to the general power of the court, and is not as to its jurisdiction in the particular estate, a different rule must prevail. In such case, the order of sale would undoubtedly be void if such want of power were shown.[2]

It is the settled doctrine of the federal courts that the jurisdiction of the court over the subject-matter, and of the person, may be inquired into by another court.[3]

The questions as to what courts have jurisdiction of the administration of estates and guardianships, and the means by which such jurisdiction may be acquired, have been sufficiently covered in another place.[4]

It remains to consider what is necessary to give a court jurisdiction to sell real estate where it has jurisdiction over the estate or guardianship. This usually depends upon statutory provisions authorizing such sales. And the statutes of the several states can not be noticed or commented upon with profit in a work of this character. We can only deal with general principles applicable to them all.

It is not sufficient to show that the court has jurisdiction of the estate. The application to sell the real estate is so far a separate and independent proceeding that the jurisdiction to order such sale must be shown, in addition to the showing of general jurisdiction over the estate.[5]

As has been said, the jurisdiction generally depends upon and is limited by statute.[6] But this is not universally the case. The power to order the sale of real estate is

[1] Bostwick *v.* Skinner, 80 Ill. 147.

[2] *Ante*, sec. 67; Withers *v.* Patterson, 27 Tex. 491; 86 Am. Dec. 643.

[3] Simmons *v.* Saul, 138 U. S. 439; 11 Sup. Ct. Rep. 369.

[4] *Ante*, sec. 67.

[5] Frazier *v.* Steenwood, 7 Ia. 339; 71 Am. Dec. 447; Bloom *v.* Burdick, 1 Hill (N. Y.), 130; 37 Am. Dec. 299; Moffitt *v.* Moffitt, 69 Ill. 641.

[6] Wyman *v.* Campbell, 6 Porter (Ala.), 219; 31 Am. Dec. 677; Johns *v.* Tiers, 114 Pa. St. 611; 7 Atl. Rep. 923; Whitman *v.* Fisher, 74 Ill. 147; Chamberlain *v.* Chamberlain, 20 Atl. Rep. 1085.

sometimes held to exist in courts of equity independent of statute.[1] As a rule, however, a court of equity has no power to order the sale of real estate, so as to affect the legal title.[2] But a court of equity has jurisdiction to set aside a fraudulent sale made by an executor, administrator, or guardian at the instance of an heir or of the ward.[3] And a guardian has no power to dispose of the real estate of his ward without an order of some court having jurisdiction.[4]

In the settlement of estates the usual ground and basis of jurisdiction to sell real estate is the existence of debts of the estate. And, generally, the want or insufficiency of personal property with which to pay such debts.[5] In the case of guardians, other causes for making such sales are usually recognized and allowed, including the reinvestment of the property to better advantage.[6] And whatever the causes and conditions, they are usually required to be set forth in a petition for such sale.

The petition is the foundation of jurisdiction and the facts upon which a sale is authorized are jurisdictional, and enough of them to bring the case within the statute must be alleged in the petition in order to vest the court with power to order the sale.[7] But a substantial compli-

[1] Smythe *v.* Henry, 41 Fed. Rep. 705; Roche *v.* Waters, 72 Md. 264; 19 Atl. Rep. 535; Shumard *v.* Philips, 53 Ark. 37; 13 S. W. Rep. 510; Thaw *v.* Falls, 10 Sup. Ct. Rep. 1037; Thaw *v.* Ritchie, 136 U. S. 519; Allen *v.* Shanks, 90 Tenn. 359; 16 S. W. Rep. 715.

[2] Whitman *v.* Fisher, 74 Ill. 147, 154.

[3] Hawley *v.* Tesch, 72 Wis. 299; 39 N. W. Rep. 483; Arrowsmith *v.* Gleason, 129 U. S. 86; 9 Sup. Ct. Rep. 237.

[4] Johns *v.* Tiers, 114 Pa. St. 611; 7 Atl. Rep. 923; Cumming *v.* Simpson, 1 S. E. Rep. 657.

[5] Gregory *v.* McPherson, 13 Cal. 562; Stuart *v.* Allen, 16 Cal. 473; 76 Am. Dec. 551; Moffitt *v.* Moffitt, 69 Ill. 641; Young *v.* Wittenmyre, 123 Ill. 203; 14 N. E. Rep. 869.

[6] Appeal of Hilton, 9 Atl. Rep. 434.

[7] Wilson *v.* Armstrong, 42 Ala. 168; 94 Am. Dec. 635; Townsend *v.* Gordon, 19 Cal. 189; Gregory *v.* McPherson, 13 Cal. 562; Wyatt *v.* Rambo, 29 Ala. 510; 68 Am. Dec. 89; Long *v.* Burnett, 13 Ia. 28; 81 Am. Dec. 420; Stevenson *v.* McReary, 12 Sm. & Mar. (Miss.) 9; 51 Am. Dec. 102; Young *v.* Lorain, 11 Ill. 624; 52 Am. Dec. 463; Gregory *v.* Taber, 19 Cal. 397; 79 Am. Dec. 219; Appeal of Hilton, 9 Atl. Rep. 434; In re

ance with the statute is all that is necessary.[1] And mere defects or informalities in the petition, which would render it subject to demurrer or other direct attack, or mere errors in the proceedings, however gross, will not affect the jurisdiction of the court or render its proceedings void.[2]

If the petition states enough to require the court to act, no matter how defectively it may be stated, the court has jurisdiction, and its proceedings can not be attacked collaterally.[3] And if one good cause for the sale is stated, the fact that another cause is stated, for which a sale can not be authorized, does not affect the jurisdiction.[4]

It is not the existence of the facts that gives the court jurisdiction, but the allegation of them in the petition. Therefore the question whether the facts alleged are true or false does not affect the jurisdiction of the court. The filing of the requisite petition calls upon the court to exercise its jurisdiction by investigating and determining whether the facts are true or false.[5] But if it appears af-

Schlee, 32 N. W. Rep. 717; Schlee *v.* Darrow, 65 Mich. 362; Moffitt *v.* Moffitt, 69 Ill. 641; Wilson *v.* Holt, 83 Ala. 528; 3 Sou. Rep. 321; Kertchem *v.* George, 78 Cal. 597; 21 Pac. Rep. 372; Abernathy *v.* O'Reilly, 90 Ala. 495; 7 Sou. Rep. 919; Needham *v.* Salt Lake City, 7 Utah, 319; 26 Pac. Rep. 920; Freeman Void Jud. Sales, secs. 10, 11, 12.

[1] Stuart *v.* Allen, 16 Cal. 473; 76 Am. Dec. 551; Morrow *v.* Weed, 4 Ia. 77; 66 Am. Dec. 122; Moffitt *v.* Moffitt, 69 Ill. 641; Townsend *v.* Steel, 85 Ala. 580; 5 Sou. Rep. 351; Burris *v.* Adams, 96 Cal. 664; 31 Pac. Rep. 565.

[2] Stuart *v.* Allen, 16 Cal. 473; 76 Am. Dec. 551; Satcher *v.* Satcher, 41 Ala. 26; 91 Am. Dec. 498; Iverson *v.* Loberg, 26 Ill. 179; 79 Am. Dec. 364; Hobson *v.* Ewan, 62 Ill. 146; Goudy *v.* Hall, 36 Ill. 313; 87 Am. Dec. 217, 222, note; Saltonstall *v.* Riley, 28 Ala. 164; 65 Am. Dec. 334; Harris *v.* Lester, 80 Ill. 307; Voorhees *v.* Jackson, 10 Pet. 449; May *v.* County of Logan, 30 Fed. Rep. 250; McLawhorn *v.* Worthington, 98 N. Car. 199; 3 S. E. Rep. 633; Moffitt *v.* Moffitt, 69 Ill. 641; Howbert *v.* Heyle, 47 Kan. 58; 27 Pac. Rep. 116.

[3] Hobson *v.* Ewan, 62 Ill. 146; Moffitt *v.* Moffitt, 69 Ill. 641.

[4] Walker *v.* Goldsmith, 14 Or. 125; 12 Pac. Rep. 537.

[5] Stuart *v.* Allen, 16 Cal. 473; 76 Am. Dec. 551; Satcher *v.* Satcher, 41 Ala. 26; 91 Am. Dec. 498; Lynch *v.* Baxter, 4 Tex. 431; 51 Am. Dec. 735; Merrill *v.* Harris, 26 N. H. 142; 57 Am. Dec. 359; Young *v.* Lorain, 11 Ill. 624; 52 Am. Dec. 463; Atkins *v.* Kinnan, 20 Wend. 241; 32 Am. Dec. 534; Norman *v.* Olney, 64 Mich. 553; 31 N. W. Rep. 555; Curran *v.* Kuby, 37 Minn. 330; 33 N. W. Rep. 907; Camden *v.* Plain, 91 Mo. 117; 4 S. W.

firmatively from the record that the required proof of the facts was not made, the order to sell will be void.[1]

And conceding that the jurisdiction of the court in such proceedings is special and limited, if it appears from the record that the court ascertained and determined the jurisdictional facts to exist, the finding will be conclusive on a collateral attack.[2] And if there is any evidence to sustain the allegation of indebtedness, the sufficiency of such evidence is not jurisdictional or the finding of the fact open to collateral attack.[3]

The order of sale is an adjudication that all the facts necessary to give the court jurisdiction existed.[4] But where the real estate goes to the executor or administrator only in case of the existence of a debt or debts, a sale made where there are no debts, or the debts have been barred by the statute of limitations, is void, although the existence of such debts is alleged in the petition and found by the court, because, in such case, the real estate not having come within the control of the executor or administrator, or of the court, there is a want of jurisdiction of the subject-matter.[5] And in some of the cases the finding by the court that debts exist is treated as *prima facie* evidence only of the fact even in case of collateral attack.[6]

Rep. 86; Chardavoyne *v.* Lynch, 82 Ala. 376; 3 Sou. Rep. 98; Deans *v.* Wilcoxon, 25 Fla. 980; 7 Sou. Rep. 163; Comstock *v.* Crawford, 3 Wall. 396; Freeman Void Jud. Sales, sec. 14.

[1] Thompson *v.* Boswell, 12 Sou. Rep. 85, 809.

[2] *Ante*, sec. 23; Wyatt *v.* Rambo, 29 Ala. 510; 68 Am. Dec. 89; Chardavoyne *v.* Lynch, 82 Ala. 376; 3 Sou. Rep. 98; Norman *v.* Olney, 64 Mich. 553; 31 N. W. Rep. 555; McKee *v.* Simpson, 36 Fed. Rep. 248; Linman *v.* Riggins, 40 La. Ann. 761; 5 Sou. Rep. 49; Marquis *v.* Davis, 113 Ind. 219; 15 N. E. Rep 251; Edwards *v.* Moore, 99 N. Car. 1; 5 S. E. Rep. 13; Robinson *v.* Epping, 24 Fla. 237; 4 Sou. Rep. 812; Wing *v.* Dodge, 80 Ill. 564; Simmons *v.* Saul, 138 U. S. 439; 11 Sup. Ct. Rep. 369.

[3] Deans *v.* Wilcoxon, 25 Fla. 980; 7 Sou. Rep. 163, 172; Robinson *v.* Epping, 24 Fla. 237; 4 Sou. Rep. 812; Comstock *v.* Crawford, 3 Wall. 396.

[4] Davis *v.* Gaines, 104 U. S. 386.

[5] Heath *v.* Wells, 5 Pick. 139; 16 Am. Dec. 383; Palmer *v.* Oakley, 2 Doug. 433; 47 Am. Dec. 41, 63; Campan *v.* Gillett, 1 Mich. 416; 53 Am. Dec. 73.

[6] Deans *v.* Wilcoxon, 25 Fla. 980; 7 Sou. Rep. 163, 172.

It must be borne in mind, in this connection, that in order to make a finding of jurisdictional facts which will be binding, the proceeding must be within the general jurisdiction of the court. It is only where the court has general jurisdiction of the settlement of estates, for example, that such findings, which relate to jurisdictional facts affecting the particular estate, can be held to be conclusive.[1]

Great liberality is displayed by the courts in upholding petitions for the sale of real estate and all proceedings had thereunder.[2] It is the policy of the law to uphold judicial sales.[3]

If the record is silent, it will be presumed that a petition was filed and that it contained all of the necessary jurisdictional facts.[4] So it will be presumed that the court adjudged every question necessary to justify the order or decree of sale and that the adjudication was sustained by proof.[5]

The petition should show that the proceeding is instituted in the proper county.[6] Sometimes the proceeding must, under the statute, be commenced where the estate is being administered.[7] Sometimes it may or must be commenced and carried on in the county where the land is situated. Sometimes proceedings are necessary in both the county where the letters were granted and the county

[1] *Ante*, sec. 67; Withers *v.* Patterson, 27 Tex. 491; 86 Am. Dec. 643.

[2] Goudy *v.* Hall, 36 Ill. 313; 87 Am. Dec. 217; McLawhorn *v.* Worthington, 98 N. Car. 199; 3 S. E. Rep. 633; Moffitt *v.* Moffitt, 69 Ill. 641; Thomson *v.* Tolmie, 2 Pet. 157.

[3] Scott *v.* Scott, 85 Ky. 385; 5 S. W. Rep. 423.

[4] Alexander *v.* Maverick, 18 Tex. 179; 67 Am. Dec. 693; Schnell *v.* City of Chicago, 38 Ill. 382; 87 Am. Dec. 304; Rowden *v.* Brown, 91 Mo. 429; 4 S. W. Rep. 129; Schaale *v.* Wasey, 70 Mich. 414; 38 N. W. Rep. 317.

[5] Florentine *v.* Barton, 2 Wall. 210; Grignon *v.* Astor, 2 How. 319; Hobson *v.* Ewan, 62 Ill. 146.

[6] Loyd *v.* Malone, 23 Ill. 43; 74 Am. Dec. 179; Spencer *v.* Jennings, 114 Pa. St. 618; 8 Atl. Rep. 2.

[7] Spencer *v.* Jennings, 114 Pa. St. 618; 8 Atl. Rep. 2; Apel *v.* Kelsey, 47 Ark. 413; 2 S. W. Rep. 102; Stack *v.* Royce, 34 Neb. 833; 52 N. W. Rep. 675.

in which the real estate is situated,[1] and sometimes, where the proceeding is by a guardian, it must be instituted in the county where the ward resides, although the estate may be in another county.[2]

In some of the states, jurisdiction to order a sale is held to be concurrent in the court of the county where the land is situated and in the court where the letters of administration were granted.[3]

The proceedings must, in order to pass the title, conform to the laws of the state in which the real estate is situate.[4] But it is not necessary that either the ward or the guardian, or the executor or administrator, be residents of the state. Provision is usually made by statute for ancillary or auxiliary proceedings in the state and county where the land is situated by a foreign guardian, executor, or administrator.[5]

So the court usually has the power to appoint a guardian for a non-resident, with authority to deal with the property of such non-resident within the jurisdiction of the court.[6] But an order made by a court for the sale of real estate situate in another state is void.[7]

A court acting *in personam* may compel the owner of land over whose person it has obtained jurisdiction to convey real estate situate in another state.[8] But neither a decree for such conveyance, nor a conveyance under it, except by the person in whom the title is vested, can operate beyond the jurisdiction of the court.[9]

While the rule is well established that a substantial

[1] Hopkins *v.* Meir, 19 Atl. Rep. 264.

[2] Loyd *v.* Malone, 23 Ill. 43; 74 Am. Dec. 179.

[3] Jones *v.* Levi, 72 Ind. 586; Williamson *v.* Miles, 25 Ind. 55.

[4] Menage *v.* Jones, 40 Minn. 254; 41 N. W. Rep. 972; Watkins *v.* Holman, 16 Pet. 25, 56.

[5] Menage *v.* Jones, 40 Minn. 254; 41 N. W. Rep. 972; Hoyt *v.* Sprague, 103 U. S. 613.

[6] Davis *v.* Hudson, 29 Minn. 27; 11 N. W. Rep. 136; Hoyt *v.* Sprague, 103 U. S. 613.

[7] Musson *v.* Fall Back, etc., Co., 12 Sou. Rep. 587; Watkins *v.* Holman, 16 Pet. 25.

[8] *Ante*, sec. 15; Watkins *v.* Holman, 16 Pet. 25.

[9] Watkins *v.* Holman, 16 Pet. 25.

compliance with the requirements of the statute is sufficient to give the court jurisdiction, there are cases which hold a strict compliance to be necessary.[1]

The property sought to be sold must be sufficiently described in the proceedings.[2]

In order to make the jurisdiction acquired by the filing of a proper petition effective, and uphold a sale made under the order, such notice of the application and the time and place of the hearing as the law requires must be given.[3] A proper petition gives the court jurisdiction of the subject-matter and the notice gives jurisdiction of the person.[4]

If the court has obtained jurisdiction by the proper petition and notice, the title of a purchaser at the sale will be protected, no matter what errors may intervene.[5] And as the petition gives jurisdiction of the subject-matter, the order or decree of sale will be binding upon such of the parties interested as have been notified, although not binding upon others not notified.[6] But it is held in some of the cases that in case of a sale by a guardian no notice to the ward is necessary unless expressly required by statute; that the guardian represents the ward and no notice is required by any general rule of law.[7]

This is the established rule in the federal courts, but a

[1] Gelstrop *v.* Moore, 26 Miss. 206; 59 Am. Dec. 254; Stevenson *v.* McReary, 12 Sm. & Mar. (Miss.) 9; 51 Am. Dec. 102; Battell *v.* Forrey, 65 N. Y. 294; Matter of Valentine, 72 N. Y. 184; Stillwell *v.* Swarthout, 81 N. Y. 109; Elwood *v.* Northrop, 106 N. Y. 172; 12 N. E. Rep. 590.

[2] Frazier *v.* Steenwood, 7 Ia. 339; 71 Am. Dec. 447.

[3] Gibson *v.* Roll, 30 Ill. 172; 83 Am. Dec. 181; Root *v.* McFerrin, 37 Miss. 17; 75 Am. Dec. 49; Clark *v.* Thompson, 47 Ill. 25; 95 Am. Dec. 457; Gibbs *v.* Shaw, 17 Wis. 197; 84 Am. Dec. 737; Beckett *v.* Selover, 7 Cal. 215; 68 Am. Dec. 237; Moffitt *v.* Moffitt, 69 Ill. 641; Menifee *v.* Marge, 4 S. E. Rep. 726; Chicago, K. & N. Ry. Co. *v.* Cook, 43 Kan. 83; 22 Pac. Rep. 988; Harrison *v.* Harrison, 106 N. Car. 282; 11 S. E. Rep. 356; Martin *v.* Neal, 125 Ind. 547; 25 N. E. Rep. 813; Cunningham *v.* Anderson, 107 Mo. 371; 17 S. W. Rep. 972; Freeman Void Jud. Sales, sec. 16.

[4] Moffitt *v.* Moffitt, 69 Ill. 641.

[5] Moore *v.* Neil, 39 Ill. 256; 89 Am. Dec. 303.

[6] Mohr *v.* Porter, 51 Wis. 487; 8 N. W. Rep. 364.

[7] Thaw *v.* Falls, 10 Sup. Ct. Rep. 1037; Thaw *v.* Ritchie, 136 U. S. 519; Mohr *v.* Manierre, 101 U. S. 417; Berrian *v.* Rogers, 43 Fed. Rep. 467.

different rule is maintained in most of the state courts.[1] But not in all of them.[2]

Frequently other conditions and limitations, jurisdictional in their nature, are imposed by statute, and must be complied with in order to vest the jurisdiction and make it effectual to pass the title.[3] But the fact that such conditions have been complied with need not appear affirmatively from the record in case of a collateral attack.[4]

The cases differ as to the necessity of making the ward a party to a petition by the guardian for a sale of real estate. In some it is held that the proceeding is not an adversary one, that the guardian represents the ward, that the ward need not be made a party, that the mere filing of an *ex parte* petition in the proper form vests the court with jurisdiction, and that no notice to the ward is necessary.[5] In others it is held that the ward must be made a party.[6] And if the ward must be made a party, he must, of necessity, have notice in order to give the court jurisdiction to bind him by its decree and order.[7] But this question generally depends upon the language of the statutory provisions.

In cases of sales by executors or administrators, the authorities are not agreed as to the necessity of making the heirs parties to the proceedings. Some of the cases hold that the proceeding is one *in rem*, to which all the world

[1] Berrian *v.* Rogers, 43 Fed. Rep. 467; *ante*, sec. 74.

[2] Scarf *v.* Aldrich, 97 Cal. 360; 32 Pac. Rep. 324; Mohr *v.* Porter, 51 Wis. 487; 8 N. W. Rep. 364.

[3] Lemoine *v.* Ducote (45 La. Ann.), 12 Sou. Rep. 939.

[4] Voorhees *v.* Jackson, 10 Pet. 449; May *v.* County of Logan, 30 Fed. Rep. 250.

[5] Smith *v.* Race, 27 Ill. 387; 81 Am. Dec. 235; Mason *v.* Wait, 4 Scam. 127, 133; Fitzgibbon *v.* Lake, 29 Ill. 165; 81 Am. Dec. 302; Furnish *v.* Auston, 7 S. W. Rep. 399; Thaw *v.* Falls, 10 Sup. Ct. Rep. 1037; Thaw *v.* Ritchie, 136 U. S. 519; Mohr *v.* Manierre, 101 U. S. 417; Scarf *v.* Aldrich, 97 Cal. 360; 32 Pac. Rep. 324; Mulford *v.* Beveridge, 78 Ill. 455; Mohr *v.* Porter, 51 Wis. 487; 8 N. W. Rep. 364; Louisville, etc., Ry. Co. *v.* Blythe, 69 Miss. 939; 11 Sou. Rep. 111.

[6] Moore *v.* Hood, 9 Rich. Eq. (S. Car.) 311; 70 Am. Dec. 210; Hunter *v.* Hatton, 4 Gill (Md.) 115; 45 Am. Dec. 117.

[7] Roche *v.* Waters, 72 Md. 264; 19 Atl. Rep. 535.

are parties, and that the heirs need not be made parties in order to give jurisdiction,[1] and that the omission to name the heirs in the petition, when required by the statute, is an error or irregularity only, not affecting the jurisdiction of the court.[2] But this must necessarily depend, in a great measure, upon the requirements of the particular statute under which the proceeding is had.[3]

Other cases hold that unless the heirs are made parties to the proceeding and notified, the order of sale is void as to them.[4] And in this respect, a distinction is made in some of the cases between guardians' sales and sales by administrators or executors, it being held, as we have seen, that in sales by guardians, the proceeding is not adverse to the ward, but that a proceeding by an administrator or executor is adverse to the heir.[5]

In cases holding the proceeding to be adverse, it is held to be one *in personam* that must be founded upon notice.[6] But this is a distinction that is not recognized in all of the cases as will be seen from the cases cited above. This matter of notice is usually governed entirely by statute, and notice in some form to the ward, or to some relative who will be likely to look after his interests, or to both, is generally required. In case of sales by executors or administrators, personal service of notice is not generally required, and notice by publication to all persons inter-

[1] McPherson *v.* Cunliff, 11 Serg. & Rawle, 422; 14 Am. Dec. 642; Lyons *v.* Hammer, 84 Ala. 197; 4 Sou. Rep. 26; Florentine *v.* Barton, 2 Wall. 210; Grignon *v.* Astor, 2 How. 319, 338; Freeman Void Jud. Sales, sec. 15; Watkins *v.* Holman, 16 Pet. 25, 62.

[2] Morris *v.* Hogle, 37 Ill. 150; 87 Am. Dec. 243; Lyons *v.* Hamner, 84 Ala. 197; 4 Sou. Rep. 26; Bingham *v.* Jones, 84 Ala. 202; 4 Sou. Rep. 409; Stow *v.* Kimball, 28 Ill. 93, 106; Hobson *v.* Ewan, 62 Ill. 146.

[3] Perry *v.* Adams, 98 N. Car. 167; 3 S. E. Rep. 729.

[4] Adams *v.* Jeffries, 12 Ohio, 253; 40 Am. Dec. 477; Reynolds *v.* Stanbury, 20 Ohio, 344, 357; 55 Am. Dec. 459; Beckett *v.* Selover, 7 Cal. 215; 68 Am. Dec. 237; Perry *v.* Adams, 98 N. Car. 167; 3 S. E. Rep. 729; Menefee *v.* Marge, 4 S. E. Rep. 726; Harrison *v.* Harrison, 106 N. Car. 282; 11 S. E. Rep. 356; Freeman Void Jud. Sales, sec. 16.

[5] Mohr *v.* Porter, 51 Wis. 487; 8 N. W. Rep. 364.

[6] Freeman Void Jud. Sales, sec. 16.

ested, or a general notice to the public, is usually authorized and held to be sufficient.[1]

Such constructive notice binds infants as well as adults.[2] But notice in such form as is required is necessary to give the court jurisdiction to order the sale.[3]

If the court has obtained jurisdiction of the subject-matter and of the person of the owner of the land, his death does not deprive the court of jurisdiction to proceed, and the failure to notify his heirs after his death does not render the sale void for want of jurisdiction.[4]

The courts have been very liberal in upholding notices as sufficient, when defective, especially where the question arises in cases affecting innocent purchasers under such proceedings, and the rule that mere defects in the notice will not render the proceedings void, or affect the title of the property conveyed, is universally applied in this class of cases.[5]

If the proper notice is given, it vests the court with jurisdiction of the person of a minor as well as of other persons interested, and the failure of a guardian *ad litem* to answer, although it may be cause for reversal, does not render the proceeding invalid as to such minor.[6]

So, where the minor is regularly notified of the proceeding, a failure to appoint a guardian *ad litem* or next friend to represent him is an irregularity only, and will not render the proceeding void as to such minor.[7] And also the failure to notify the guardian *ad litem* where the minors

[1] Hobson *v.* Ewan, 62 Ill. 146; Gibson *v.* Roll, 27 Ill. 88; 81 Am. Dec. 219.

[2] Thomas *v.* Parker, 97 Cal. 456; 32 Pac. Rep. 562.

[3] Morris *v.* Hogle, 37 Ill. 150; 87 Am. Dec. 243.

[4] 1 Black Judg., sec. 200; Palmerton *v.* Hoop, 131 Ind. 23; 30 N. E. Rep. 874.

[5] Goudy *v.* Hall, 36 Ill. 313; 87 Am. Dec. 217; Harris *v.* Lester, 80 Ill. 307; Bunce *v.* Bunce, 59 Ia. 533; 13 N. W. Rep. 705; Hamiel *v.* Donnelly, 75 Ia. 93; 39 N. W. Rep. 210; Scarf *v.* Aldrich, 97 Cal. 360; 32 Pac. Rep. 324.

[6] Goudy *v.* Hall, 36 Ill. 313; 87 Am. Dec. 217.

[7] Tate *v.* Mott, 96 N. Car. 19; 2 S. E. Rep. 176; Gage *v.* Schroder, 73 Ill. 44.

have been properly served.[1] But the appointment of a guardian *ad litem* and an answer by him will not give the court jurisdiction where no notice has been given,[2] nor can such guardian, when appointed, waive notice to the minor defendant.[3] But where a minor has been notified and is properly represented by guardian *ad litem*, the proceedings are just as binding and conclusive upon him as they would be upon an adult properly represented by his attorney.[4] It is usually held that a general guardian can not appear for and waive service upon his ward.[5] But there are cases holding to the contrary.[6]

Where the court has obtained jurisdiction, a sale of the property to a third party will not be affected by a subsequent reversal of the order or judgment decreeing the sale.[7]

It is generally held, at the present day, that it will be presumed, where the record is silent on the subject, that the proper notice was given.[8] But the rule has, in some of the authorities, been limited to cases where the heirs who are entitled to notice have been made parties to the record by name.[9]

Where the record recites the giving of notice, or other jurisdictional facts, this is usually held to be sufficient to uphold the jurisdiction in the absence of any showing to the contrary in the record or proceedings, and that the finding that notice was given can not be attacked collaterally.[10]

[1] Coffin *v.* Cook, 106 N. Car. 376; 11 S. E. Rep. 371.

[2] Clark *v.* Thompson, 47 Ill. 25; 95 Am. Dec. 457; Moore *v.* Starks, 1 Ohio St. 369; Freeman Void Jud. Sales, sec. 17.

[3] *Ante*, secs. 13, 23, 34; Clark *v.* Thompson, 47 Ill. 25; 95 Am. Dec. 457; Freeman Void Jud. Sales, sec. 17.

[4] Chardavoyne *v.* Lynch, 82 Ala. 376; 3 Sou. Rep. 98.

[5] *Ante*, secs. 13, 34; Freeman Void Jud. Sales, sec. 17.

[6] *Ante*, sec. 34; Ewing *v.* Higby, 7 Ohio, Part 1, 198; 28 Am. Dec. 633.

[7] Goudy *v.* Hall, 36 Ill. 313; 87 Am. Dec. 217; Whitman *v.* Fisher, 74 Ill. 147.

[8] *Ante*, secs. 23, 25; Martin *v.* Robinson, 67 Tex. 368; 3 S. W. Rep. 550; Kelley *v.* Morrell, 29 Fed. Rep. 736.

[9] Mitchell *v.* Bowen, 8 Ind. 197; 65 Am. Dec. 758.

[10] *Ante*, secs. 23, 25; Harris *v.* Lester, 80 Ill. 307; Martin *v.* Robinson, 67 Tex. 368; 3 S. W. Rep. 550; Goodwin *v.* Sims, 86 Ala. 102; 5 Sou.

The general rule is that where jurisdiction appears on the face of the record, a purchaser is not required to look beyond the decree or order for the sale.[1] It is usually held that the record of the court imports absolute verity and can not be impeached collaterally.[2] But where the court is held to be one of special jurisdiction, an order made by it for the sale of real estate is not of itself, independent of a recital of the jurisdictional facts in the record or proceedings, evidence that the court had jurisdiction.[3]

As has been said, however, jurisdiction of this kind has, by the great weight of modern authority, been declared to be general, and not special; and if general, the mere rendition of the order or decree is, in case of a domestic court, at least, conclusive evidence in case of a collateral attack, that the court had jurisdiction.[4]

In some of the cases in which the jurisdiction is treated as special it is held that the recitals in the record are *prima facie* evidence only of the facts recited.[5]

The court ordering the sale must have jurisdiction of the subject-matter as well as of the persons of the parties interested. Therefore an order of a court in one state for the sale of property situate in another state is void for want of jurisdiction of the subject-matter.[6]

In most of the states provision is made for the confirma-

Rep. 587; Edwards *v.* Moore, 99 N. Car. 1; 5 S. E. Rep. 13; Richardson *v.* Butler, 82 Cal. 174; 23 Pac. Rep. 9.

[1] Thomson *v.* Tolmie, 2 Pet. 157.

[2] Davis *v.* Hudson, 29 Minn. 27; 11 N. W. Rep. 136; Culver *v.* Hardenbergh, 37 Minn. 225; 33 N. W. Rep. 792; Curran *v.* Kuby, 37 Minn. 330; 33 N. W. Rep. 907; Succession of Keller, 39 La. Ann. 579; 2 Sou. Rep. 553; Linman *v.* Riggins, 40 La. Ann. 761; 5 Sou. Rep. 49; Goodwin *v.* Sims, 86 Ala. 102; 5 Sou. Rep. 587; Schaale *v.* Wasey, 70 Mich. 414; 38 N. W. Rep. 317; Grevemburg *v.* Bradford, 44 La. Ann. 400; 10 Sou. Rep. 786; Davis *v.* Gaines, 104 U. S. 386; Bostwick *v.* Skinner, 80 Ill. 147.

[3] Sloan *v.* Sloan, 25 Fla. 53; 5 Sou. Rep. 603.

[4] *Ante*, sec. 23.

[5] Comstock *v.* Crawford, 3 Wall. 396.

[6] Salmond *v.* Price, 13 Ohio, 368; 42 Am. Dec. 204; Price *v.* Johnston, 1 Ohio St. 390.

tion of sales by the court. As to the effect of such confirmation the authorities are not agreed. In some it is held that, in order to render the confirmation effectual, the court must have obtained jurisdiction of the proceeding by the filing of the necessary petition and the giving of the required notice. And that without this the proceedings are void, notwithstanding the order of confirmation.[1] But if the court has jurisdiction, an order confirming a sale may uphold it in favor of an innocent purchaser, although it would otherwise be invalid for want of a compliance with the requirements of the statute.[2] And where a confirmation is required by statute before the making of the conveyance, such confirmation is necessary to the validity of the title.[3] A confirmation will not be presumed, but must be affirmatively shown.[4]

In some of the cases an order of confirmation is treated as a judgment, and is, therefore, conclusive in case of a collateral attack.[5]

In some of the states provision is made for the commencement of proceedings by a creditor for a sale of real estate to satisfy his debt.[6]

In such cases the general principles affecting the jurisdiction are the same, in all material respects, as in proceedings instituted by the executor or administrator.

It is sometimes required by statute that, upon a sale being ordered, the guardian, or other person authorized to make the sale, shall execute an additional bond to secure the amount to be realized from the sale. But the failure to give such bond does not affect the jurisdiction of the

[1] Mitchell *v.* Bowen, 8 Ind. 197; 65 Am. Dec. 758; Cunningham *v.* Anderson, 107 Mo. 371; 17 S. W. Rep. 972.

[2] Brown *v.* Christie, 27 Tex. 73; 84 Am. Dec. 607; Apel *v.* Kelsey, 47 Ark. 413; 2 S. W. Rep. 102; May *v.* County of Logan, 30 Fed. Rep. 250.

[3] Titman *v.* Riker, 43 N. J. Eq. 122; 10 Atl. Rep. 397; Apel *v.* Kelsey, 47 Ark. 413; 2 S. W. Rep. 102; Harrison *v.* Ilgner, 74 Tex. 86; 11 S. W. Rep. 1054; Bone *v.* Tyrrell, 113 Mo. 175; 20 S. W. Rep. 796.

[4] Apel *v.* Kelsey, 47 Ark. 413; 2 S. W. Rep. 102.

[5] Andrews *v.* Goff, 17 R. I. 205; 21 Atl. Rep. 347; Allen *v.* Shanks, 90 Tenn. 359; 16 S. W. Rep. 715.

[6] Brooks *v.* Brooks, 97 N. Car. 136; 1 S. E. Rep. 487.

court, or render the sale invalid as affecting an innocent purchaser.[1] Nor does a defect in the original bond of the guardian affect the jurisdiction to sell the real estate,[2] nor a defect in the additional bond.[3] It will be presumed, where the record is silent on the subject, that the proper bond was given.[4] The question whether the giving of a bond is necessary to the validity of the sale depends, of course, upon the requirements of the statute under which the proceedings are had. And under some statutes it has been held that a failure to give the bond invalidates the sale.[5]

A proceeding for the sale of real estate is within the act of congress authorizing the removal of causes from the state to the federal courts, and a federal court may obtain jurisdiction thereof by such removal, although the same could not be originally commenced in such court.[6]

The question has been presented to the courts, at various times, whether the legislature can, by special statute, and without the intervention of the courts, authorize the sale of the property of one person by another. The question turns upon the character of the act authorizing the sale, whether it is judicial in its nature or not. Such statutes authorizing the sale of lands by one occupying a trust relation to another, who is incapable of acting for himself, have been upheld on the ground that to grant such permission, when necessary or proper to carry out the trust, is not an act in itself judicial.[7]

[1] Fender *v.* Powers, 67 Mich. 433; 35 N. W. Rep. 80; Davidson *v.* Bates, 111 Ind. 391; 12 N. E. Rep. 687; Hamiel *v.* Donnelly, 75 Ia. 93; 39 N. W. Rep. 210; Kelly *v.* Pitcher, 4 N. Y. Supl. 3; Arrowsmith *v.* Harmoning, 42 Ohio St. 254; Howbert *v.* Heyle, 47 Kan. 58; 27 Pac. Rep. 116; Arrowsmith *v.* Gleason, 129 U. S. 86; 9 Sup. Ct. Rep. 237.

[2] Kelley *v.* Morell, 29 Fed. Rep. 736.

[3] In re Winona Bridge Ry. Co., 52 N. W. Rep. 1079.

[4] Saul *v.* Frame, 22 S. W. Rep. 984.

[5] Weld *v.* Johnson Mfg. Co., 54 N. W. Rep. 335.

[6] Elliott *v.* Shuler, 50 Fed. Rep. 454; *ante*, sec. 67;

[7] Rice *v.* Parkman, 16 Mass. 326; Carroll *v.* Olmsted, 16 Ohio, 251; Williamson *v.* Suydam, 6 Wall. 723; Clark *v.* Van Surlay, 15 Wend 436;

But this doctrine has not been accepted in other cases.[1]

If the authorization calls for an investigation and a judgment thereon, it is clearly a judicial act, and can not be exercised by the legislative branch of the government.[2] And a statute authorizing one not occupying a fiduciary relation to another to sell the real estate of the latter can not be supported on any such principle, and such statutes are held to be unconstitutional.[3]

Nor can a special statute attempting to authorize the sale of the property of one not laboring under any disability, and capable of acting for himself, be upheld.[4] The weight of authority seems to be that statutes of the former class are valid, and that those of the latter class are invalid.[5]

It is believed to be unnecessary, in this connection, to incumber these pages with a discussion of jurisdictional questions growing out of the sales of real estate resulting from ordinary adversary proceedings, whether such pro-

Cochran *v.* Van Surlay, 20 Wend. 365; 32 Am. Dec. 570; Wilkinson *v.* Leland, 2 Pet. 627; Brevoort *v.* Grace, 53 N. Y. 245; Watkins *v.* Holman, 16 Pet. 25, 59; Hoyt *v.* Sprague, 103 U. S. 613; Louisville, etc., Ry. Co. *v.* Blythe, 69 Miss. 939; 11 Sou. Rep. 111.

[1] Jones *v.* Perry, 10 Yerg. (Tenn.) 59; 30 Am. Dec. 430; Lincoln *v.* Alexander, 52 Cal. 482; 28 Am. Rep. 639.

[2] *Ante*, secs. 29, 33; Rice *v.* Parkman, 16 Mass. 326.

[3] Lane *v.* Dorman, 3 Scam. (Ill.) 238; 36 Am. Dec. 543; Cash, Appellant, 6 Mich. 193; Powers *v.* Bergen, 6 N. Y. 358; Shoenberger *v.* School Directors, 32 Pa. St. 34.

[4] Brevoort *v.* Grace, 53 N. Y. 245, 254.

[5] Cooley Const. Lim., * pp. 97–107.

"The rule upon this subject, which appears to be deducible from the authorities, is this: If the party standing in position of trustee applies for permission to convert by a sale the real property into personal, in order to effectuate the purposes of the trust, and to accomplish objects in the interest of the *cestui que trust* not otherwise attainable, there is nothing in the granting of permission which is in its nature judicial. To grant permission is merely to enlarge the sphere of the fiduciary authority, the better to accomplish the purpose for which the trusteeship exists; and while it would be entirely proper to make the questions which might arise assume a judicial form, by referring them to some proper court for consideration and decision, there is no usurpation of power if the legislature shall, by direct action, grant the permission." Cooley Const. Lim., * p. 98.

ceedings be governed by the common law, by statutes, or by equitable principles. These questions have been sufficiently covered by the discussion, in the previous sections of this work, of the general principles affecting all adversary proceedings. And it would seem to be unnecessary, also, to consume time in discussing the sale or other disposition of property by proceedings in partition. Such proceedings are governed at the present day almost entirely by statutes in the different states. And, in the main, general principles affecting other adversary proceedings are applicable to them. It is of but little consequence, practically, whether such jurisdiction is exercised by a court of equity, probate courts, or courts of general common law or statutory jurisdiction, as in any case the statute of the particular state in which the jurisdiction is exercised is the guide of the court and the measure and limitation of its jurisdiction. But it is held in some of the states that a statute providing for the partition of lands does not deprive a court of chancery of its jurisdiction in such proceedings, and that such statute does not apply to such courts.[1]

77. ARBITRATION. Arbitration is defined to be "the investigation and determination of a matter or matters of difference between contending parties by one or more unofficial persons, chosen by the parties and called arbitrators or referees."[2] There are, in most of the states, two kinds of arbitration, common law and statutory.[3] The most material differences between the two are that a common law submission may, except where the subject-matter can only pass by writing, be by parol, while statutes providing for arbitration usually require the submission to be in writing;[4] and common law awards under arbitrations, stand upon the decision of the arbitrators alone without

[1] Labadie *v.* Hewitt, 85 Ill. 341. [2] 1 Am. & Eng. Enc. of Law, 647.
[3] Boots *v.* Canine, 58 Ind. 450.
[4] 1 Am. & Eng. Enc. of Law, 655; Boots *v.* Canine, 58 Ind. 450; Boots *v.* Canine, 94 Ind. 408; Dilks *v.* Hammond, 86 Ind. 563; Carson *v.* Earlywine, 14 Ind. 256; Darling *v.* Darling, 16 Wis. 644.

the intervention of or any action on the part of the courts, while statutory awards are usually required to be reported to and confirmed by some designated court and made the foundation of a judgment or decree of such court;[1] and in case of common law arbitrations no particular form of submission is necessary, so that the intention of the parties is apparent,[2] while in case of a statutory arbitration the submission must be such, in form and substance, substantially, as the statute requires.[3] But the courts have shown great liberality in upholding statutory awards made under defective submissions.[4]

It has sometimes been held that a submission that does not conform to the statute may be upheld as a common law award. But where it appears from the submission that it was the intention of the parties to proceed under the statute and there is a failure to comply therewith, the award can not be enforced by either of the parties as a common law award.[5]

The subject of jurisdiction in matters of arbitration presents two phases necessary to be considered, viz., the question of the jurisdiction and powers of the arbitrators, and the effect of a submission to arbitration of matters involved in actions pending, upon the jurisdiction of the courts in which such actions have been commenced. And the former of these, so far as it affects statutory arbitrations, involves, also, the jurisdiction of the court to which the award is returned and its power to receive and act upon it.[6]

These will be considered as briefly as possible and with-

[1] Boots *v.* Canine, 58 Ind. 450; Estep *v.* Larsh, 16 Ind. 82; Hedrick *v.* Judy, 23 Ind. 548.

[2] 1 Am. & Eng. Enc. of Law, 656.

[3] 1 Am. & Eng. Enc. of Law, 654; Hamilton *v.* Hamilton, 27 Ill. 158; Barney *v.* Flower, 27 Minn. 403; 7 N. W. Rep. 823; Franklin M'f'g Co. *v.* Pratt, 101 Mass. 359; Kreiss *v.* Hotaling, 96 Cal. 617; 31 Pac. Rep. 740; Darling *v.* Darling, 16 Wis. 644; Conger *v.* Dean, 3 Ia. 463; 66 Am. Dec. 93.

[4] 1 Am. & Eng. Enc. of Law, 655. [5] Allen *v.* Chase, 3 Wis. 249.

[6] Ryan *v.* Dougherty, 30 Cal. 219; Fortune *v.* Killebrew, 23 S. W. Rep. 976.

out cumbering the subject with a discussion of mere matters of practice not affecting the subject of jurisdiction.

It may be said, generally, that the submission, whether it be a common law or a statutory one, is the measure and limitation of the jurisdiction and powers of the arbitrators.[1] And this is true of submissions of matters pending in court.[2] But this is subject to statutory regulations and the power of the disputants to submit, as well as the jurisdiction of the arbitrators to decide, may be limited and controlled by law.

Where the submission is of matters pending in court, all of the parties to the action must consent to such submission or it will be void.[3] And the same rule applies to a statutory submission of matters not pending in court. Unless all parties in interest join in the submission, the award, and a judgment entered thereon, are void.[4]

The parties are entitled to notice of the time and place of the hearing, and unless such notice is given or waived, an award made will be void.[5] And the arbitrators must meet at the time and place named in the submission.[6] So the parties must have an opportunity to be present at every stage of the investigation.[7] But such notice is waived by an appearance,[8] or by such acts as show that it

[1] 1 Am. & Eng. Enc. of Law, 675; Ryan *v.* Dougherty, 30 Cal. 219; Muldrow *v.* Norris, 12 Cal. 331; Gear *v.* Bracken, 1 Pinney (Wis.), 249; Cook *v.* Carpenter, 34 Vt. 121; 80 Am. Dec. 670; Strum *v.* Cunningham, 3 Ohio, 286; Buntain *v.* Curtis, 27 Ill. 373; Palmer *v.* Van Wick, 21 S. W. Rep. 761.

[2] Cook *v.* Carpenter, 34 Vt. 121; 80 Am. Dec. 670.

[3] Gregory *v.* Boston Safe Deposit, etc., Co., 36 Fed. Rep. 408.

[4] Fortune *v.* Killebrew, 23 S. W. Rep. 976.

[5] 1 Am. & Eng. Enc. of Law, 685; Curtis *v.* Sacramento, 64 Cal. 102; 28 Pac. Rep. 108; Elmendorf v. Harris, 23 Wend. 628; 35 Am. Dec. 587; Lutz *v.* Lithicum, 8 Pet. 165; Dormoy *v.* Knower, 55 Ia. 722; 8 N. W. Rep. 670; Grimes *v.* Brown, 18 S. E. Rep. 87; Warren *v.* Tinsley, 53 Fed. Rep. 689; 3 C. C. A. Rep. 613; Emery *v.* Owings, 7 Gill (Md.), 488; 48 Am. Dec. 580; Slocum *v.* Damon, 1 Pinney (Wis.), 520. But see to the contrary, note to Elmendorf *v.* Harris, 35 Am. Dec. 587, 591.

[6] Strum *v.* Cunningham, 3 Ohio, 286.

[7] Rosenau *v.* Legg, 82 Ala. 568; 2 Sou. Rep. 441; Alexander *v.* Cunningham, 111 Ill. 511.

[8] 1 Am. & Eng. Enc. of Law, 686; Dickerson *v.* Hays, 4 Blkf. (Ind.) 44; Kane *v.* City of Fond du Lac, 40 Wis. 495.

was the purpose and intention of the parties that the notice should not be given.[1] Notice to one of several partners, although they have signed the submission separately, is sufficient.[2]

The duration of the authority of the arbitrators may be fixed and limited by the submission and such limitation as to time will be binding.[3] And an award delivered after the time designated in the submission is inoperative.[4]

The failure to make the award within the time limited deprives the court to which the award is to be returned, as well as the arbitrators, of jurisdiction.[5] But the time may be extended by consent of the parties.[6]

A failure of the arbitrators to meet at the time fixed in the submission does not determine their powers, unless it is so provided in the submission, and they may appoint another time of meeting.[7]

The powers and jurisdiction of the arbitrators expire with the making of the award.[8] And they can not afterward alter or change their award,[9] nor make a new award where the first is void for defects therein.[10] But may correct mere clerical errors not involving a reconsideration of the merits.[11]

An attempt on the part of the arbitrators to change the award after it is made does not render it void, but the award stands as it was originally made.[12]

Statutes sometimes require that the submission shall fix the time within which the award shall be made. Under such a statute, and a submission made under it, an award

[1] Spencer *v.* Curtis, 57 Ind. 221; Hubbard *v.* Hubbard, 61 Ill. 228.

[2] Haywood *v.* Harmon, 17 Ill. 477.

[3] 1 Am. & Eng. Enc. of Law, 688; Ryan *v.* Dougherty, 30 Cal. 219.

[4] Conrad *v.* Johnson, 20 Ind. 421. [5] Ryan *v.* Dougherty, 30 Cal. 219.

[6] Buntain *v.* Curtis, 27 Ill. 373. [7] Harrington *v.* Rich, 6 Vt. 666.

[8] 1 Am. & Eng. Enc. of Law, 689; Porter *v.* Scott, 7 Cal. 312; Rogers *v.* Corrothers, 26 W. Va. 238; Flannery *v.* Sahagian, 134 N. Y. 85; 31 N. E. Rep. 319; Bayne *v.* Morris, 1 Wall. 97.

[9] Indiana Cent. Ry. Co. *v.* Bradley, 7 Ind. 49; Rogers *v.* Corrothers, 26 W. Va. 238; Flannery *v.* Sahagian, 134 N. Y. 85; 31 N. E. Rep. 319.

[10] Flannery *v.* Sahagian, 134 N. Y. 85; 31 N. E. Rep. 319.

[11] Gooddell *v.* Raymond, 27 Vt. 241; Bayne *v.* Morris, 1 Wall. 97.

[12] Rogers *v.* Corrothers, 26 W. Va. 238.

made after the time limited, gives the court to which it is returned no jurisdiction.[1]

Power is usually given to appoint an umpire in case the arbitrators fail to agree. If so the submission controls as to the manner of his appointment and his powers when appointed.[2] At common law the appointment may be by parol.[3]

If the submission does not provide the manner of appointing an umpire, it is generally held that if the submission is in writing the umpire must be appointed in writing, otherwise he may be appointed by parol.[4] But where the statute requires the appointment to be in writing the statute must be followed.[5] If power to appoint an umpire is not given by the submission, no such power exists.[6]

The award may, at common law, be in parol unless it disposes of property which can only be passed by a written instrument.[7] But whether the proceedings are in writing or in parol they must conform, in all material respects, to the submission.[8]

A statutory award must conform to the requirements of the statute.[9] The award must cover the whole subject-matter submitted or it will be void.[10] But it is held that in order to impeach an award made in pursuance of a conditional submission, on this ground, only a part of the matters submitted having been decided, the party must distinctly show that there were other points in dif-

[1] Bent *v.* Erie Telegraph & Tel. Co., 114 Mass. 165; 10 N. E. Rep. 778.

[2] 1 Am. & Eng. Enc. of Law, 690.

[3] Elmendorf *v.* Harris, 23 Wend. 628; 35 Am. Dec. 587.

[4] 1 Am. & Eng. Enc. of Law, 691.

[5] Elmendorf *v.* Harris, 23 Wend. 628; 35 Am. Dec. 587; In re Grening, 26 N. Y. Supl. 117.

[6] McMahan *v.* Spinning, 51 Ind. 187.

[7] 1 Am. & Eng. Enc. of Law, 692; Marsh *v.* Packer, 20 Vt. 198.

[8] Gear *v.* Bracken, 1 Pinney (Wis.), 249; Pettibone *v.* Perkins, 6 Wis. 616; Johnson *v.* Noble, 13 N. H. 286; 38 Am. Dec. 485.

[9] 1 Am. & Eng. Enc. of Law, 692; Estep *v.* Larsh, 16 Ind. 82.

[10] Porter *v.* Scott, 7 Cal. 312; Muldrow *v.* Norris, 12 Cal. 331; White *v.* Arthur, 59 Cal. 33; Pettibone *v.* Perkins, 6 Wis. 616; Canfield *v.* Watertown F. Ins. Co., 55 Wis. 419; 13 N. W. Rep. 252; Morse *v.* Hale, 27 Vt. 660; Jones *v.* Welwood, 71 N. Y. 208.

ference, of which express notice was given the arbitrators and that they neglected to determine them.[1] And where the submission covers all matters in difference between the parties they may, on the hearing, submit such matters only as they may elect and the award upon such matters will be valid and binding.[2]

It is sometimes said that an award may be good in part and bad in part, but this rule applies only to cases where the arbitrators have exceeded their powers and passed upon matters not submitted, and not affecting the matters submitted, or where the defect is as to some independent and distinct matter forming no consideration for other parts of the award and the settlement of which could not have contributed to induce the arbitration.[3] But in the absence of a showing to the contrary it will be presumed that all matters submitted were considered and passed upon.[4] No intendments will be indulged to overturn an award, but all reasonable presumptions are in its favor.[5]

If the statute provides that the submission may be made a rule of a certain court or class of courts, no other court has jurisdiction to make it a rule of such court or to proceed in the matter.[6]

So it has been held that where the statute provides that the submission may be made a rule of any court of record, it can not be made a rule in the court of a justice of the peace, and that such court has no jurisdiction to render judgment on an award, because the court is not one of record.[7] But this rule would not hold good in those states in which a court of a justice of the peace is held to be a court of record.[8]

[1] Karthaus *v.* Ferrer, 1 Pet. 222. [2] Young *v.* Kinney, 48 Vt. 22.

[3] Muldrow *v.* Norris, 12 Cal. 331; White *v.* Arthur, 59 Cal. 33; Sabin *v.* Angell, 44 Vt. 523; McCullough *v.* McCullough, 12 Ind. 487.

[4] Hadaway *v.* Kelly, 78 Ill. 286; Darst *v.* Collier, 86 Ill. 96.

[5] Russell *v.* Smith, 87 Ind. 457; Dolph *v.* Clemens, 4 Wis. 181; Slocum *v.* Damon, 1 Pinney (Wis.), 520; Bash *v.* Christian, 77 Ind. 290; Lutz *v.* Linthicum, 8 Pet. 165.

[6] Richards *v.* Reed, 39 Ind. 330.

[7] Richards *v.* Reed, 39 Ind. 330; Hollingsworth *v.* Stone, 90 Ind. 244.

[8] *Ante*, secs. 6, 7.

If the submission provides that it be made a rule of a court not having jurisdiction of the subject-matter, or that the award be entered as the judgment of such a court, the whole proceeding is void, and neither the arbitrators nor the court have jurisdiction.[1]

And where the statute has not been substantially followed in submitting the subject-matter to arbitration, the court obtains no jurisdiction, and a judgment rendered on the award is void, although the submission may be sufficient as a common law submission and the award valid and binding on the parties as a common law award.[2]

Usually, a confirmation by the court of a statutory award is required before a judgment can be rendered thereon, and under such a statute a judgment rendered on the award without such confirmation is invalid.[3] Nor is the award enforcible unless confirmed by the court.[4] But the parties may waive the confirmation and consent that judgment may be rendered without it, and such judgment will be valid.[5]

Notice of the time and place of an application for the confirmation of the award is necessary.[6] But the notice may be waived.[7]

The statutes of the several states differ as to the kind of publication or notice of the making of the award or the filing of the same in court. But whatever the requirement of the statute may be as to notice or publication, it must be complied with.[8] But the required notice or publication may be waived.[9]

[1] Williams *v.* Walton, 9 Cal. 143.

[2] Kreiss *v.* Hotaling, 96 Cal. 617; 31 Pac. Rep. 740; Allen *v.* Chase, 3 Wis. 249; Fairchild *v.* Doten, 42 Cal. 125.

[3] Healy *v.* Isaacs, 73 Ind. 226. [4] Bash *v.* Van Osdol, 75 Ind. 186.

[5] Lovell *v.* Wheaton, 11 Minn. 92.

[6] Brace *v.* Stacy, 56 Wis. 148; 14 N. W. Rep. 51, Springfield & S. Ry. Co. *v.* Calkins, 90 Mo. 538; 3 S. W. Rep. 82.

[7] Brace *v.* Stacy, 56 Wis. 148; 14 N. W. Rep. 51; Matthews *v.* Miller, 25 W. Va. 817.

[8] Russell *v.* Clark, 60 Wis. 284; 18 N. W. Rep. 844; Flatter *v.* McDermott, 15 Ind. 389; Coulter *v.* Coulter, 81 Ind. 542.

[9] Coulter *v.* Coulter, 81 Ind. 542.

Usually, statutes allow an award to be made by a majority of the arbitrators, where the parties do not provide to the contrary in the submission.[1] But it is held otherwise as to a common law arbitration.[2]

And where an award by a majority is authorized, it will be void if one of the arbitrators is not notified of the hearing and given an opportunity to be present, and is not in fact present.[3]

Where an umpire is provided for and appointed, such umpire and one of the arbitrators, where there are two arbitrators, may make the award.[4] An award by less than the whole number of arbitrators is invalid where the submission requires that it shall be concurred in by all.[5]

There is some difference of opinion in the decided cases as to the effect of a submission to arbitration of matters involved in an action pending in court. Where the submission is a statutory one in which the award is to be returned into court and made the foundation of a judgment, and the court designated is the one in which the action is pending, the action is suspended by such submission until the award is made, when the judgment should be rendered on such award in lieu of a decision of the court or verdict of a jury.[6] And it is held, generally, that a submission of a cause pending in a court, to arbitration, operates as a discontinuance of the action and deprives the court of jurisdiction.[7] But the mere submission does not bar the action,

[1] Buxton *v.* Howard, 38 Ind. 109; Doyle *v.* Patterson, 84 Va. 800; 6 S. E. Rep. 138.

[2] Baker *v.* Farmbrough, 43 Ind. 240; Hubbard *v.* Great Falls Mfg. Co., 80 Me. 39; 12 Atl. Rep. 878; Leavitt *v.* Windsor Land & Im. Co., 54 Fed. Rep. 439; 4 C. C. A. Rep. 425; Byard *v.* Harkrider, 108 Ind. 376; 9 N. E. Rep. 294; Patterson *v.* Leavitt, 4 Conn. 50; 10 Am. Dec. 98; Green *v.* Miller, 6 Johns. 39; 5 Am. Dec. 184.

[3] Doherty *v.* Doherty, 148 Mass. 367; 19 N. E. Rep. 352; Kent *v.* French, 76 Ia. 187; 40 N. W. Rep. 713.

[4] Stiringer *v.* Toy, 33 W. Va. 86; 10 S. E. Rep. 26.

[5] Weaver *v.* Powel, 148 Pa. St. 372; 23 Atl. Rep. 1070.

[6] Grayson *v.* Meredith, 17 Ind. 357; McCarthy *v.* Mack, 145 Mass. 471; 14 N. E. Rep. 635.

[7] Gunter *v.* Sanchez, 1 Cal. 45; Draghicevich *v.* Vulicevich, 76 Cal. 378; 18 Pac. Rep. 406; Muckey *v.* Pierce, 3 Wis. 307; Dolph *v.* Clemens,

and if the submission be revoked, suit may again be maintained.[1]

The parties may provide in the submission that the same shall cause a suspension, and not a discontinuance, of the action.[2] And under statutes in some of the states it is held that the submission does not work a discontinuance of the action.[3]

A mere agreement, made in advance, that matters of difference that may arise between the parties shall be submitted to arbitration, and an award thereunder shall be binding upon the parties, will not deprive the courts of jurisdiction.[4]

In order to give a court jurisdiction of the parties, and of the subject-matter, where no action is pending, and to authorize it to render judgment on the award, the statutory provisions by which the matter is authorized to be so adjudicated must be substantially complied with.[5]

In some of the cases it is held that the proceeding is one in derogation of the common law, and that therefore the statute must be strictly complied with.[6] None of the requirements of the statute can be dispensed with so far as they affect the submission.[7] An appeal may be taken from a judgment of the court on an award of arbitrators.[8]

4 Wis. 181; Bigelow *v.* Goss, 5 Wis. 421; Grosvenor *v.* Hunt, 11 How. Pr. 355; Buell *v.* Dewey, 22 How. Pr. 342; McNulty *v.* Solley, 66 How. Pr. 147.

[1] Muckey *v.* Pierce, 3 Wis. 307; Buel *v.* Dewey, 22 How. Pr. 342.

[2] Ensign *v.* St. Louis & S. F. Ry. Co., 62 How. Pr. 123.

[3] Hunsden *v.* Churchill, 20 Minn. 408.

[4] Dugan *v.* Thomas, 79 Mo. 221; 9 At. Rep. 354; Allegre *v.* Maryland Ins. Co., 6 Harris & Johns. (Md.) 408; 14 Am. Dec. 289; March *v.* Eastern R. Co., 40 N. H. 548; 77 Am. Dec. 732; Pearl *v.* Harris, 121 Mass. 390; Old Saucelito L. & D. D. Co. *v.* Commercial Co., 66 Cal. 253; 5 Pac. Rep. 232; Holmes *v.* Richet, 56 Cal. 307; 38 Am. Rep. 54.

[5] Ryan *v.* Dougherty, 30 Cal. 219; Kettleman *v* Treadway, 65 Cal. 505; 4 Pac. Rep. 506; Pieratt *v.* Kennedy, 43 Cal. 393; Fairchild *v.* Doten, 42 Cal. 125; Heslep *v.* City of San Francisco, 4 Cal. 1.

[6] Steel *v.* Steel, 1 Nev. 27.

[7] Hamilton *v.* Hamilton, 27 Ill. 158; Barney *v.* Flower, 27 Minn. 403; 7 N. W. Rep. 823.

[8] Fairchild *v.* Doten, 42 Cal. 125.

Provision is made in some of the states for a reference of a pending action to referees. Under such statutes the report of the referee is essentially the same as the award of arbitrators.[1]

Arbitrators have jurisdiction of the law, and of the facts, under a general submission.[2]

A judgment on an award has the same force and effect as one rendered upon a trial of a cause in court.[3] If an arbitrator is interested in the matter in controversy or not disinterested for other reasons, and this is unknown to the parties, or either of them, the award will be invalid.[4] But such objection may be waived, and, if the parties consent that such interested party may act, an award made by him will be upheld.[4]

In some of the states it is held that an arbitrator must be sworn or his award will be invalid, unless the oath is waived by the parties.[5] This is usually controlled by statute, in case of statutory arbitrations, and if the statute requires that the arbitrators be sworn, its provisions must be followed in this as in all other matters. But it is a requirement that may be waived by the parties.[6] But generally it is held that the taking of the oath is not jurisdictional, and that the failure to take it does not render the proceeding wholly void.[7]

78. NE EXEAT AND ARREST AND BAIL.—The writ *ne exeat regno*, or, in this country, *ne exeat republica*, is a writ in equity issued to restrain a defendant from quitting the state until bail is given to perform the decree of the

[1] Grayson *v.* Guild, 4 Cal. 122.

[2] Ormsby *v.* Blakewell, 7 Ohio, 99; Ruckman *v.* Ransom, 23 N. J. Eq. 118; United States *v.* Farragut, 22 Wall. 406; Boston Water Power Co. *v.* Gray, 6 Met. 131; Johnson v. Noble, 13 N. H. 286; 38 Am. Dec. 485; Bigelow *v.* Newell, 27 Mass. 348.

[3] Johnston *v.* Paul, 23 Minn. 46.

[4] Connor *v.* Simpson, 7 Atl. Rep. 161; Baltimore & O. R. Co. *v.* Canton Co., 70 Md. 405; 17 Atl. Rep. 394.

[5] Inslee *v.* Flagg, 2 Dutcher (N. Jer.) 368; 69 Am. Dec. 580; Combs *v.* Little, 3 Green Ch. 310; 40 Am. Dec. 207.

[6] Hill *v.* Taylor, 15 Wis. 190; Woodrow *v.* O'Connor, 28 Vt. 776.

[7] Elmendorf *v.* Harris, 35 Am. Dec. 592, note.

court.[1] And as the writ is designed to procure bail upon giving security to answer the bill, where a discovery is necessary, and to abide the order and decree of the court, and to be amenable to the process issued to enforce the same, or in such other form as may be provided by statute, he is entitled to his discharge.[2] But the writ has not been confined wholly to equitable remedies, but has been extended to cases of alimony decreed to a wife, and cases of account on which a balance is admitted by the defendant, but a larger claim is insisted on by the creditor.[3]

The demand for which the writ will issue must be certain in its nature, and actually payable, and not contingent or of an unliquidated nature, or in the nature of damages.[4]

[1] Anderson's Dic. of Law, 433; Adams' Eq. 360; Story's Eq. Jur., secs. 1464 et seq.; 16 Am. & Eng. Enc. of Law, 375; Gibert *v.* Colt, 1 Hopk. Ch. (N. Y.) 496; 14 Am. Dec. 557, 560, note; Moore *v.* Valda, 151 Mass. 363; 23 N. E. Rep. 1102; Rev. Stat. U. S., sec. 717; Lewis *v.* Shainwald, 48 Fed. Rep. 492; Cable *v.* Alvora, 27 Ohio St. 654; Forrest *v.* Forrest, 5 How. Pr. 125; De Rivafinoli *v.* Corsetti, 4 Paige Ch. 264; 25 Am. Dec. 532; Mitchell *v.* Bunch, 2 Paige Ch. 606; 22 Am. Dec. 669; Bonesteel *v.* Bonesteel, 28 Wis. 245; Dean *v.* Smith, 23 Wis. 483; 99 Am. Dec. 198; Rice *v.* Hale, 59 Mass. 238.

"The writ of *ne exeat* is a writ to restrain a person from quitting the kingdom without the king's license or the leave of the court. It is a high prerogative writ, and was originally applicable to purposes of state only, but is now extended to private transactions, and operates in the nature of equitable bail. It is grantable wherever a present equitable debt is owing, which, if due at law, would warrant an arrest, and also to enforce arrears of alimony in aid of the Spiritual Court, in respect of the inability of that court to require bail. It may be granted where there is a concurrent jurisdiction at law, *e. g.*, on bills for an account, or for specific performance; but not where the claim is of legal cognizance alone." Adams' Eq. 360; Williams *v.* Williams, 3 N. J. Eq. 130.

[2] Mitchell *v.* Bunch, 2 Paige Ch. 606; 22 Am. Dec. 669.

[3] 2 Story's Eq. Jur., sec. 1471; 16 Am. & Eng. Enc. of Law, 379; Gibert *v.* Colt, 14 Am. Dec. 560, note; Yule *v.* Yule, 10 N. J. Eq. 138; Bushnell *v.* Bushnell, 15 Barb. 399.

[4] Story's Eq. Jur., sec. 1474; Adams Eq., 8th Ed., p. 360, note; 16 Am. & Eng. Enc. of Law, 375; Rhodes *v.* Cousins, 6 Rand. (Va.) 188; 18 Am. Dec. 715; Rice *v.* Hale, 59 Mass. 238.

"A writ of *ne exeat* can not be granted unless, 1st, there be a precise amount of debt due; 2d, it be on an equitable demand, on which the

The writ has become of less consequence than formerly by reason of constitutional provisions forbidding imprisonment for debt.[1] But it is still maintained notwithstanding these constitutional inhibitions, either as a distinctive writ or by statutory proceedings of arrest and bail, which are made applicable to both actions at law and proceedings in equity.[2]

It is generally held that constitutional provisions against imprisonment for debt do not prevent such imprisonment in cases of fraud or for torts.[3] And some of the cases hold, without qualification, that the constitutional provisions against imprisonment for debt are not applicable to imprisonment under writs of *ne exeat*.[4] But the remedy when provided by statute is usually confined to cases of fraud, either in the making of the contract or incurring the liability, or in concealing or removing property subject to execution, or to causes of action involving a breach of some fiduciary obligation, or for tort, and the like, the causes for which the writ may issue, or the defendant be arrested, in a proceeding for arrest and bail or *ne exeat* being different in the different states.[5]

And statutes authorizing imprisonment for such causes

plaintiff can not sue at law, except in cases of account, and a few others of concurrent jurisdiction; and 3d, the defendant be about to quit the country, proved by affidavits as positive as those required to hold to bail at law." Adams Eq., 8th Ed., p. 360, note; Rhodes *v.* Cousins, 6 Rand. 188; 18 Am. Dec. 715.

[1] 16 Am. & Eng. Enc. of Law, 375.

[2] Gibert *v.* Colt, 14 Am. Dec. 561, note; Cable *v.* Alvord, 27 Ohio St. 654; Dean *v.* Smith, 23 Wis. 483; 99 Am. Dec. 198.

[3] Powers *v.* Davenport, 101 N. Car. 286; 7 S. E. Rep. 747; Baker *v.* State, 109 Ind. 47; 9 N. E. Rep. 711; McKindley *v.* Rising, 28 Ill. 337; Malcolm *v.* Andrews, 68 Ill. 100.

[4] Dean *v.* Smith, 23 Wis. 483; 99 Am. Dec. 198.

[5] Swift *v.* The State, 63 Ind. 81; Cooper *v.* Hart, 18 Atl. Rep. 122; Wilbur *v.* Allen, 5 N. Y. Supl. 746; Valentine *v.* Richardt, 6 N. Y. Supl. 197; Powers *v.* Davenport, 101 N. Car. 286; 7 S. E. Rep. 747; Bridgers *v.* Taylor, 102 N. Car. 86; 8 S. E. Rep. 893; Baker *v.* State, 109 Ind. 47; 9 N. E. Rep. 711; Warner *v.* Bates, 75 Wis. 278; 43 N. W. Rep. 957; Hood *v.* Sudderth, 111 N. Car. 215; 16 S. E. Rep. 397; Malcolm *v.* Andrews, 68 Ill. 100.

are upheld as not in violation of the constitution.[1] But notwithstanding the constitutional provisions against imprisonment for debt, the statutes of the several states have increased, rather than diminished, the classes of remedies in which an arrest of the defendant may be had, either under the writ of *ne exeat* or arrest and bail.[2]

The power of the federal courts and judges to issue the writ is limited by statute.[3] The power to issue such writs is usually given to the judges or chancellors as well as to the courts. And sometimes the power is vested by statute in masters in chancery.[4]

Very similar to this equitable remedy is that of arrest and bail, except that the latter is applicable to common law liabilities. Their objects and the purposes for which they may be maintained, as well as the principles by which they are controlled and regulated, are so nearly alike that they may very properly be considered together, although the means by which the creditor is secured is different under this and under the process of a common law court. The writ of *ne exeat* acts directly upon the person of the defendant, but its object is to coerce him to comply with the decree of the court when rendered.[5]

Originally the common law remedy of arrest and bail was confined to civil injuries accompanied by force.[6] But the remedy has been so changed and modified by statutes, both in this country and in England, that the old writ of *capias*, in either of its forms, whether to compel the ap-

[1] Baker *v.* State, 109 Ind. 47; 9 N. E. Rep. 711; In re Milburn, 59 Wis. 24; 17 N. W. Rep. 965.

[2] McGee *v.* McGee, 8 Ga. 295; 52 Am. Dec. 407.

[3] Rev. Stat. U. S., secs. 716, 717; Shainwald *v.* Lewis, 46 Fed. Rep. 839.

[4] Bassett *v.* Bratton, 86 Ill. 152.

[5] Some of the differences between *ne exeat* and the common law remedy of arrest and bail will be found pointed out in Forrest *v.* Forrest, 5 How. Pr. 125, 131, in which case it is maintained, in opposition to the decisions in other states, that the code provisions authorizing and limiting arrest and bail have not superseded and abolished the writ. See also to the same effect, Bushnell *v.* Bushnell, 7 How. Pr. 389; 15 Barb. 399. See to the contrary, Ex parte Harker, 49 Cal. 465; Cable *v.* Alvord, 27 Ohio St. 654, 667.

[6] Foulkes' Ac. in Sup. Court, 124; 3 Blk. Comm. 281.

pearance of the defendant, or to compel his imprisonment until the creditor's debt is satisfied, is no longer recognizable.[1]

In some of the states the writ has been replaced by statutory proceedings for arrest and bail, sometimes under the old name of *ne exeat*, and sometimes under the name of arrest and bail. And in some the writ of *ne exeat* is maintained and allowed, under statutory regulations, in certain classes of cases, and the statutory remedy of arrest and bail is allowed in certain other cases. Indeed, the proceeding by writ of *ne exeat* has become almost entirely statutory.[2] And in some of the states the writ has been abolished and a purely statutory proceeding substituted for it.[3]

Code provisions, by which the distinctions between actions at law and suits in equity are abolished, and the civil action of such codes made to include both, do not, of themselves, deprive the courts of the power and jurisdiction exercised by courts of chancery in proceedings of this kind.[4]

The proceeding when founded upon fraud is very similar to, and rests upon like principles as, the proceeding for attachment growing out of the fraudulent attempt or intent to remove property out of the jurisdiction of the court, and thus deprive the creditor of his remedy against such property when his judgment is obtained.[5]

A complaint or petition must be filed showing such a cause of action as will authorize the issuance of the writ.[6]

[1] Foulkes' Ac. in Sup. Ct. 124, 203; 1 Am. & Eng. Enc. of Law, 719, 720.

[2] 2 Work's Ind. Prac. & Pl., secs. 1292, 1453.

[3] Ex parte Harker, 49 Cal. 465; Gibert *v.* Colt, 14 Am. Dec. 561, note; Cable *v.* Alvord, 27 Ohio St. 654, 667.

[4] In re Milburn, 59 Wis. 24; 17 N. W. Rep. 965; Bushnell *v.* Bushnell, 15 Barb. 399.

[5] Fitzgerald *v.* Gray, 59 Ind. 254.

[6] Saratoga Gas, etc., Co. *v.* Hazard, 7 N. Y. Supl. 844; Hillis *v.* Bleckert, 6 N. Y. Supl. 405; Bartlett *v.* Sutornis, 6 N. Y. Supl. 406; 9 N. Y. Supl. 2; People *v.* Snaith, 10 N. Y. Supl. 589; Hanson *v.* Langan, 9 N. Y. Supl. 625; Moffat *v.* Fulton, 9 N. Y. Supl. 771; Ex parte Cohen, 6 Cal. 319.

And an affidavit showing the fraudulent acts or intention of the defendant, or other grounds which authorize the commencement of the proceeding, must be made and filed,[1] and an undertaking, such as the statute requires, must be given before the writ can be properly issued.[2]

But in some of the states proceedings for the writ of *ne exeat* is allowed to be instituted as a separate and distinct proceeding before the debt matures, while that of the statutory arrest and bail is made auxiliary to an action for the recovery of the debt as in case of attachment.

The affidavit must be positive in its terms and not on information and belief,[3] and must show personal knowledge of the facts necessary to authorize the issuance of the writ, or state circumstances from which the facts must necessarily be deduced, or the proceeding will be void.[4]

It is held to be sufficient to allege the facts on information and belief under some circumstances of excuse to be alleged in the affidavit.[5] And in some cases it is held, generally, that the affidavit may be on information and belief.[6] The affidavit must show the venue or it will be void and confer no jurisdiction.[7]

If the application is based upon the fraudulent intent

[1] Ramsey *v.* Foy, 10 Ind. 493; Fitzgerald *v.* Gray, 59 Ind. 254; 1 Am. & Eng. Enc. of Law, 721; Gibert *v.* Colt, 14 Am. Dec. 562, note; Wilbur *v.* Allen, 5 N. Y. Supl. 746; Valentine *v.* Richardt, 6 N. Y. Supl. 197; People *v.* Snaith, 10 N. Y. Supl. 589; In re Vanamee, 8 N. Y. Supl. 219; In re Vinich, 86 Cal. 70; 26 Pac. Rep. 528; Bonesteel *v.* Bonesteel, 28 Wis. 245.

[2] Ramsey *v.* Foy, 10 Ind. 493; Fitzgerald *v.* Gray, 59 Ind. 254.

[3] People *v.* Snaith, 10 N. Y. Supl. 589; In re Vanamee, 8 N. Y. Supl. 219; Thompson *v.* Best, 4 N. Y. Supl. 229; Martin *v.* Gross, 4 N. Y. Supl. 337; Markey *v.* Diamond, 20 N. Y. Supl. 847; In re Vinich, 86 Cal. 70; 26 Pac. Rep. 528; Whitlock *v.* Roth, 5 How. Pr. 143; McGilvery *v.* Morehead, 2 Cal. 607.

[4] Marble *v.* Curran, 63 Mich. 283; 29 N. W. Rep. 725; De Long *v.* Briggs, 47 Mich. 625; 11 N. W. Rep. 412; Thompson *v.* Best, 4 N. Y. Supl. 229.

[5] City Bank *v.* Lumly, 28 How. Pr. 397; Crandall *v.* Bryan, 15 How. Pr. 48.

[6] Matoon *v.* Eder, 6 Cal. 58.

[7] Saril *v.* Payne, 4 N. Y. Supl. 897.

to remove property out of the jurisdiction of the court, the property must be shown to be subject to execution.[1]

In equity the proceeding may be commenced at any stage of the cause, but only on a bill filed.[2] The application may be made by motion or petition, and must be supported by affidavit.[3] It is held in some of the cases, however, that the writ may issue upon affidavit before any action is commenced by the filing of a bill or complaint.[4]

The writ has been held not to be a mere provisional remedy, in the sense that it can only be issued pending the suit, and must expire on the rendition of the judgment, but that its issuance may be provided for in the final decree, and continues until the judgment is satisfied or security given.[5]

Statutes authorizing the proceeding, being in restraint of liberty, must be strictly complied with.[6] Under the statutes the proceeding is not generally confined to equitable actions,[6] and is extended to debts not yet due.[6]

A defective affidavit or petition for the writ may be amended.[7] So of a defective undertaking.[8] Therefore a defect in the petition or affidavit will not affect the jurisdiction of the court or render the proceeding wholly void where there are facts alleged tending to establish a cause for issuing the writ. Such a showing, although insufficient if attacked directly, calls upon the court or judge to decide whether the facts alleged are sufficient or not, and his decision can not be collaterally attacked.[9] But it is

[1] Jones *v.* Kennicott, 83 Ill. 484.

[2] 16 Am. & Eng. Enc. of Law, 379; Lewis *v.* Shainwald, 48 Fed. Rep. 492.

[3] 16 Am. & Eng. Enc. of Law, 380; Bassett *v.* Bratton, 86 Ill. 152.

[4] Bushnell *v.* Bushnell, 7 How. Pr. 389; Clark *v.* Clark, 26 Atl. Rep. 1012.

[5] Lewis *v.* Shainwald, 48 Fed. Rep. 492.

[6] Ramsey *v.* Foy, 10 Ind. 493.

[7] Louderback *v.* Rosengrant, 4 Ind. 563; Bassett *v.* Bratton, 86 Ill. 152; Fisher *v.* Stone, 3 Scam. (Ill.) 68; McBride *v.* Langan, 10 N. Y. Supl. 554.

[8] Fitzgerald *v.* Gray, 59 Ind. 254.

[9] Bassett *v.* Bratton, 86 Ill. 152; Fisher *v.* Stone, 3 Scam. (Ill.) 68; Dusy *v.* Helm, 59 Cal. 188.

held that there can be no amendment of the affidavit where it is void and not merely defective.[1] And this is in conformity to the rule generally applied in cases of attachment and other extraordinary remedies.[2]

The right to the issuance of the writ depends upon the presence of the defendant within the jurisdiction and not upon his residence or the place where the cause of action arose, nor, necessarily, upon the presence of property within the jurisdiction of the court.[3] Nor is it necessary that the defendant should be actually within the state when the application for the writ is made.[4] But under some of the statutory remedies of this character a defendant can be arrested only in the county of his residence.[5]

A writ of *ne exeat* will not be allowed under the chancery practice where there is an adequate remedy at law.[6] And it is usually held that statutes authorizing the extraordinary remedy of imprisonment can not be enforced where the creditor can recover by the ordinary means provided by law.[7]

79. INJUNCTIONS. The remedy of injunction is a purely equitable one, but, like almost all other remedies, legal or equitable, it has become, to a large extent, statutory, in the sense that the power to issue the writ is, in most of the states expressly conferred, and the exercise of the power directly limited, by statute. But, notwithstanding these statutory provisions and regulations, the jurisdiction to issue writs of injunction, by courts of original jurisdiction, remains very much as it was under the old equity

[1] Saril *v.* Payne, 4 N. Y. Supl. 897. [2] *Ante*, sec. 74, p. 544.

[3] Gibert *v.* Colt, 1 Hopk. Ch. (N. Y.) 496; 14 Am. Dec. 557, 560, note; Powers *v.* Davenport, 101 N. Car. 286; 7 S. E. Rep. 747; Enos *v.* Hunter, 4 Gil. (Ill.) 212; Parker *v.* Parker, 12 N. J. Eq. 105; Mitchell *v.* Bunch, 2 Paige Ch. 606; 22 Am. Dec. 669.

[4] Parker *v.* Parker, 12 N. J. Eq. 105.

[5] Hatch *v.* Saunders, 66 Mich. 181; 33 N. W. Rep. 178.

[6] Victor Scale Co. *v.* Shurtleff, 81 Ill. 313; Rhodes *v.* Cousins, 6 Rand. 188; 18 Am. Dec. 715.

[7] Baker *v.* State, 109 Ind. 47; 9 N. E. Rep. 711.

practice.[1] And the combination of common law and equity jurisdiction in the same courts, as is done in most of the states, does not change the rule. It is the remedy that controls and not the court by which it is administered.[2]

With reference to appellate courts the state constitutions or statutes frequently confer upon such courts jurisdiction to issue and determine writs of *habeas corpus*, *mandamus*, *injunction*, *quo warranto*, and *certiorari*. And sometimes general words are used, such as "other original and remedial writs," in order, apparently, to vest in appellate courts jurisdiction over all such writs.[3]

The effect of such and similar provisions will be considered further on in this section.

The statutes have extended, rather than limited, the jurisdiction of the courts in affording injunctive relief. And the tendency of the courts has been rather to extend their jurisdiction, in applying injunctive relief, where the power is not limited by express law.[4] This is particularly noticeable in the decisions of some of the federal courts growing out of difficulties between employers and employes resulting in "strikes."[5]

The equity jurisdiction of the federal courts can not be increased by state laws.[6]

It is not the intention to attempt to point out here the particular cases in which injunction will lie, or the particular grounds upon which a court of equity will exercise this power, but to discuss the general principles, only, upon which the jurisdiction of courts

[1] Trustees of German, etc., Church *v.* Hoessli, 13 Wis. 348; Neiser *v.* Thomas, 99 Mo. 224; 12 S. W. Rep. 725.

[2] Bouton *v.* City of Brooklyn, 7 How. Prac. 198, 205.

[3] Attorney-General *v.* Railroad Companies, 35 Wis. 425.

[4] Merced Mining Co. *v.* Fremont, 7 Cal. 317; 68 Am. Dec. 262; Murdock *v.* Walker, 152 Pa. St. 595; 25 Atl. Rep. 492.

[5] Coeur d'Alene Con. Mining Co. *v.* Miners Union, 51 Fed. Rep. 260; In re Higgins, 27 Fed. Rep. 443; Toledo, etc., Ry. Co. *v.* Pennsylvania Co., 54 Fed. Rep. 730, 746; United States *v.* Workingmen's Council, 54 Fed. Rep. 994.

[6] Clapp *v.* City of Spokane, 53 Fed. Rep. 515.

of equity to issue the writ can be maintained. But there are certain classes of cases which it is deemed best to consider, separately, in this connection, as they involve some principles applicable to themselves alone. These include proceedings for the levy and enforcement of taxes, issuance and sale of municipal bonds, and other acts of public officers, and proceedings in other courts, including the enforcement of their judgments.

The remedy, and the extent to which it may be enforced, is so familiar to the practicing lawyer that a very brief consideration of the subject, in a work on jurisdiction, would seem to be sufficient. The jurisdiction of a court of equity to afford relief by way of injunction rests, in most cases, upon well settled principles and clearly defined grounds. Of these may be enumerated: The prevention of irreparable injury,[1] or of a multiplicity of actions,[2] to prevent the infliction of an injury for which the injured party can have no adequate remedy at law,[3] or where the obligation, the subject, or foundation, of the action, arises from a trust; or to prevent vexatious litigation.[4]

These grounds of equitable jurisdiction, as well as the limitations upon such jurisdiction, have been perpetuated in most of the states by express statutory provisions.[5]

[1] Smith *v.* Weldon, 73 Ind. 454; Wilson *v.* City of Mineral Point, 39 Wis. 160; Newall *v.* Staffordville, etc., Co., 13 Atl. Rep. 270; Thomas *v.* Musical, etc., Union, 2 N. Y. Supl. 195.

[2] Coeur d'Alene Con. Min. Co. *v.* Miners' Union, 51 Fed. Rep. 260, 265; Lewis *v.* Rough, 26 Ind. 398; Slack *v.* Lawrence Tp., 19 Atl. Rep. 663; Shafer *v.* Stull, 32 Neb. 94; 48 N. W. Rep. 882.

[3] Bronk *v.* Riley, 2 N. Y. Supl. 266; Sedalia Brewing Co. *v.* Sedalia Water-Works Co., 34 Mo. App. 49.

[4] Kitts *v.* Williams, 89 Ind. 95.

[5] As a sample of this kind of legislation, the code of California may be cited, which provides:

"Except where otherwise provided by this title, a final injunction may be granted to prevent the breach of an obligation existing in favor of the applicant:

"1. Where pecuniary compensation would not afford adequate relief;

"2. Where it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief;

"3. Where the restraint is necessary to prevent a multiplicity of judicial proceedings; or,

If the right to an injunction depends upon a disputed question of law, a court of equity will not grant a temporary writ until such question is determined by the proper court.[1]

The most important and familiar limitation of the power of courts to interfere, by injunction, is that the remedy can not be resorted to where the party seeking the writ has an adequate remedy at law.[2]

And this limitation has been carried into the statute of the United States.[3]

Therefore, in order to call for the exercise of equitable jurisdiction by way of injunction, it must be shown, affirmatively, that the complainant has no adequate remedy at law.[4]

To determine, under this limitation, what will amount to an adequate remedy at law, such as will preclude the

"4. Where the obligation arises from a trust.

"An injunction can not be granted:

"1. To stay a judicial proceeding pending at the commencement of the action in which the injunction is demanded, unless such restraint is necessary to prevent a multiplicity of such proceedings;

"2. To stay proceedings in a court of the United States;

"3. To stay proceedings in another state upon a judgment of a court of that state;

"4. To prevent the execution of a public statute, by officers of the law, for the public benefit;

"5. To prevent the breach of a contract, the performance of which would not be specifically enforced;

"6. To prevent the exercise of a public or private office, in a lawful manner by the person in possession;

"7. To prevent a legislative act by a municipal corporation."

Civil Code Cal., secs. 3422, 3423; see also Thacher *v.* Humble, 67 Ind. 444.

[1] Delaware, L. & W. R. Co. *v.* Central Stock Yards, etc., Co., 43 N. J. Eq. 77; 10 Atl. Rep. 602.

[2] 10 Am. & Eng. Enc. of Law, 792; Smith *v.* Welden, 73 Ind. 454; Sims *v.* City of Frankfort, 79 Ind. 446; Lenz *v.* Charlton, 23 Wis. 478; Suess *v.* Noble, 31 Fed. Rep. 855; Haskell *v.* Thurston, 80 Me. 129; 13 Atl. Rep. 273.

[3] Rev. Stat. U. S., sec. 723; Suess *v.* Noble, 31 Fed. Rep. 855.

[4] St. Louis, etc., Ry. Co. *v.* Reynolds, 89 Mo. 146; 1 S. W. Rep. 208; McClung *v.* Livesay, 7 W. Va. 329; Poyer *v.* Village of Desplaines, 123 Ill. 111; 13 N. E. Rep. 819.

interference of a court of equity by injunction, has been the most difficult task for the courts. It will be found, therefore, that the courts differ widely upon this question, and that no definite or precise rule can be laid down on the subject.[1]

In certain classes of cases, of course, the question gives rise to but little difficulty; but in others, while a remedy at law exists, the question whether such remedy is adequate or not must be determined, largely, by the circumstances of each case.

It is not sufficient to deprive the party of the right to an injunction that he may recover a judgment at law. If it appears that such a judgment, when recovered, will not afford him adequate relief, he is still entitled to equitable relief.[2]

So the solvency or insolvency of the party complained against often becomes a material factor in determining whether a court of equity has power to interfere or not. And it is usually held that if a judgment at law would be unavailing, because of the insolvency of the wrongdoer, an injunction should issue.[3]

So if the injury about to be inflicted is of such a peculiar nature, or will affect such property, as can not be adequately compensated for in damages, this will entitle the party to equitable relief.[4]

A simple trespass committed by one able to respond in damages can not be enjoined. But if the trespass is about to be committed under a claim of right, and the possession thus acquired may ripen into a title, injunction will lie.[5]

[1] Oliver *v.* Pray, 4 Ohio, 175, 192.

[2] Wilson *v.* City of Mineral Point, 39 Wis. 160; Troe *v.* Larson, 84 Ia. 649; 51 N. W. Rep. 179; Wilson *v.* Hill, 46 N. J. Eq. 367; 19 Atl. Rep. 1097.

[3] Coeur d'Alene Mining Co. *v.* Miners' Union, 51 Fed. Rep. 260; Wilson *v.* Hill, 46 N. J. Eq. 367; 19 Atl. Rep. 1097.

[4] Thacher *v.* Humble, 67 Ind. 444; Lutheran, etc., Church *v.* Gristgau, 34 Wis. 328; Trustees *v.* Hoessli, 13 Wis. 348.

[5] Kyle *v.* Board of Commissioners, 94 Ind. 115; City of New Albany *v.* White, 100 Ind. 206.

So where the entry is made by an officer under the order of a judicial tribunal, asserting the right to make a permanent appropriation of the plaintiff's land,[1] or where the injury will be irreparable,[2] or where the injury threatened will be continuous and constantly recurring,[3] or work a permanent injury,[4] or where a multiplicity of suits will be avoided by the injunction.[5]

So where a lien upon real estate exists as security and the security is inadequate the owner will, at the instance of the lien-holder, be enjoined from cutting timber or doing other acts which will still further reduce the value of the land.[6] So the remedy will be applied in favor of a reversioner to prevent waste by a tenant for years.[7]

It is not necessary that the party should have an adequate remedy by the ordinary proceedings at law to defeat his right or deprive a court of equity of jurisdiction. If he has an adequate remedy by any of the extraordinary proceedings at law, as for example, by *mandamus*, or *certiorari*, or attachment, he must resort to such remedy.[8]

Usually a party can not be protected by an injunction when he can recover damages at law for the threatened injury if inflicted. But if the injury is such that just and

[1] Erwin *v.* Fulk, 94 Ind. 235.

[2] Harris *v.* Township Board, 22 Mo. App. 462.

[3] Pence *v.* Garrison, 93 Ind. 345, 349; Ellis *v.* Wren, 84 Ky. 254; 1 S. W. Rep. 440; Troe *v.* Larson, 84 Ia. 649; 52 N. W. Rep. 179; Lembeck *v.* Nye, 47 Ohio St. 336; 24 N. E. Rep. 686; Shafer *v.* Stull, 32 Neb. 94; 48 N. W. Rep. 882.

[4] Pettigrew *v.* Village of Evansville, 25 Wis. 223; 3 Am. Rep. 50; Richards *v.* Dower, 64 Cal. 62; 28 Pac. Rep. 113.

[5] Nichols *v.* Jones, 19 Fed. Rep. 855; Ladd *v.* Osborne, 79 Ia. 93; 44 N. W. Rep. 235; Ellis *v.* Wren, 84 Ky. 254; 1 S. W. Rep. 440.

[6] Bunker *v.* Locke, 15 Wis. 635; Fairbank *v.* Cudworth, 33 Wis. 358.

[7] Poertner *v.* Russell, 33 Wis. 193.

[8] Hoboken Land & Imp. Co. *v.* Mayor, 31 N. J. Eq. 461; Heywood *v.* City of Buffalo, 14 N. Y. 534; Corwin *v.* Campbell, 45 How. Pr. 9; Van Natta-Lynds Drug Co. *v.* Gerson, 43 Kan. 660; 23 Pac. Rep. 1071; Bodman *v.* Drainage Commissioners, 132 Ill. 439; 24 N. E. Rep. 630; Burgess *v.* Davis, 138 Ill. 578; 28 N. E. Rep. 817.

adequate damages can not be estimated, or be measured by any certain pecuniary standard, an injunction will issue.[1]

Where the jurisdiction is concurrent with that of a court of law a court of equity will not interfere with the proceedings at law unless it can give a better remedy or the case can be better tried by the procedure of a court of equity.[2] But if a court of equity has taken jurisdiction of an action for another purpose it may retain the case for all purposes and afford equitable relief although other relief might be had in a court of law.

Injunction can only issue against parties to the suit, or persons affected by, or acting in contravention of, some order or decree of the court, or of the pending proceeding.[3]

The issuance of temporary injunctions or restraining orders rests in the discretion of the court and the writ will not be issued except upon a clear showing. This is especially true of mandatory injunctions.[4]

The granting of injunctions rests in the sound discretion of the court and will never be granted when they would be against good conscience, or productive of hardship, oppression, injustice, or public or private mischief.[5]

The power to issue writs of injunction is usually confined to courts of original jurisdiction.[6] But the power to exercise such jurisdiction exists in appellate courts, so far as it is necessary to carry out their general appellate

[1] Wilson *v.* City of Mineral Point, 39 Wis. 160; Mechanics' etc., Bank *v.* Debolt, 1 Ohio St. 592; Westmoreland, etc., Co. *v.* DeWitt, 130 Pa. St. 235; 18 Atl. Rep. 724; Bronk *v.* Riley, 2 N. Y. Supl. 266; Hodge *v.* Giese, 43 N. J. Eq. 342; 11 Atl. Rep. 484.

[2] 10 Am. & Eng. Enc. of Law, 795.

[3] 10 Am. & Eng. Enc. of Law, 796.

[4] Delaware, etc., Co. *v.* Central Stock Yard, etc., Co., 43 N. J. Eq. 605; 12 Atl. Rep. 374.

[5] Sheldon *v.* Rockwell, 9 Wis. 166; 76 Am. Dec. 265; Pettibone *v.* La Crosse, etc., R. Co., 14 Wis. 443; Cobb *v.* Smith, 16 Wis. 661.

[6] Kent *v.* Mahaffy, 2 Ohio St. 498; Campbell *v.* Campbell, 22 Ill. 664; Bryant *v.* People, 71 Ill. 32; Cooper *v.* City of Mineral Point, 34 Wis. 181.

jurisdiction, enforce their orders, judgments and decrees, and protect litigants in their rights affected by the appeal during the pendency of the action in such courts.[1] And to this extent the jurisdiction is inherent and can not be taken away by the law-making power.[2]

On the other hand, if a court is, by the constitution, limited in its powers to appellate jurisdiction, the legislature can not invest it with original jurisdiction to issue injunctions.[3]

Constitutional or statutory provisions, found in many of the states, conferring upon appellate courts jurisdiction to issue and determine writs of *habeas corpus*, *mandamus*, *injunction*, *quo warranto*, *certiorari*, and other original and remedial writs have given rise to some confusion, and considerable diversity of opinion, as to the extent of the jurisdiction thus conferred, particularly as respects the writ of injunction. The other writs specifically mentioned differ essentially from the writ of injunction. They are original, jurisdictional, and prerogative writs. The writ of injunction is not. Jurisdiction over the other writs might reasonably be granted to an appellate court as a part of its general power to supervise and control subordinate courts and other departments of state, and as a part of the sovereign power to be used for the purpose of protecting the sovereignty, in all its departments, and of protecting the citizens in their liberties.[4]

[1] Elliott's Appel. Proc., sec. 512; Kent *v.* Mahaffy, 2 Ohio St. 498; Leech *v.* The State, 78 Ind. 570; Cooper *v.* City of Mineral Point, 34 Wis. 181.

[2] Elliott's Appel. Proc., sec. 512.

[3] Campbell *v.* Campbell, 22 Ill. 664; Vail *v.* Dinning, 44 Mo. 210; Foster *v.* State, 41 Mo. 61.

[4] Attorney-General *v.* Railroad Companies, 35 Wis. 425, 513, 518; Attorney-General *v.* Blossom, 1 Wis. 317; Vail *v.* Dinning, 44 Mo. 210: Attorney-General *v.* City of Eau Claire, 37 Wis. 400, 442.

"The grant is to the supreme court of the state, in the full significance of that term given in Attorney-General *v.* Blossom, designed to have a general judicial oversight of the state in all its interests, public and private. To this court, as such, are given general appellate jurisdiction and superintending control over all other courts throughout the state, because these are essential to the judicial supremacy of the court

But while the writ of injunction may be used for like purposes it is generally resorted to for the protection of private property and private rights. It has never been classed as an original or prerogative writ.[1]

in all ordinary litigation; and original jurisdiction of certain writs, 'because they are designed for the very purpose of protecting the sovereignty and its ordained offices from invasion or intrusion, and also to nerve its arm to protect its citizens in their liberties, and to guard its prerogatives and franchises against usurpation.' This is the language of the court in Attorney-General *v.* Blossom, which we adopt and approve as applicable to the question before us. And it tends to show, as the whole opinion in that case shows, that the three grants of jurisdiction proceed on one policy; appellate jurisdiction, to decide finally all ordinary litigation; superintending jurisdiction over all other courts to control the course of ordinary litigation in them; and, outside of these, original jurisdiction of certain proceedings at law and in equity, to protect the general interests and welfare of the state and its people, which it would not do (to quote Smith, J., again) to dissipate and scatter among many inferior courts. Here are three jurisdictions, but one policy, to make this court indeed a supreme judicial tribunal over the whole state; a court of last resort on all judicial questions under the constitution and laws of the state; a court of first resort on all judicial questions affecting the sovereignty of the state, its franchises or prerogatives, or the liberties of its people." Attorney-General *v.* Railroad Companies, 35 Wis. 425, 518.

[1] "In Attorney General *v.* Blossom, Smith, J., speaking of the group of writs given to the court, says that 'this class of writs, it would seem, appertain to and are peculiarly the instruments of the sovereign power, acting through its appropriate department, prerogatives of sovereignty,' etc. He calls them indiscriminately original and prerogative writs; and says that they 'differ essentially, in their character and objects, from ordinary writs issued by the courts in the regular and usual administration of the law between parties. They go to accomplish peculiar and specific objects, carrying with them the special mandate of the sovereign power, etc. They bear no resemblance to the usual processes of courts by which controversies between private parties are settled by the judicial tribunals of every grade.' He speaks particularly of the writs of *certiorari* and injunction as 'remedial writs of a high judicial character, and essential to the complete exercise of the function of sovereignty in the administration of justice.'

"Substantially correct of all the other writs named, this language does not appear to be accurately used of the writ of injunction. At common law, all the other writs given were prerogative writs, issuing on behalf of the state only; and though sometimes used for private remedy, were so used on special leave given, and in the name of the state, and were not ordinary writs applicable to private controversies or issuable of

Under these constitutional and statutory provisions conferring jurisdiction, generally, over the writs mentioned, the question arose whether the intention and effect was to

course. All the other writs must or might be original; as given to this court they must be original writs, in the modern and practical sense of the term original writs. The writ of injunction was not original. They are, as given, essentially jurisdictional writs, implying the jurisdiction granted in each case, *ex vi termini*. The writ of injunction was not an original writ, and by itself, as given, implies no specific jurisdiction. It was a judicial writ, going only upon some judgment, interlocutory or final, of the court issuing it, in some case of which the court had jurisdiction otherwise; never jurisdictional, but always remedial in aid of jurisdiction already attached, within the vast range of equitable cognizance. And the difficulty arises wholly from placing this non-jurisdictional writ in a group of jurisdictional writs; this judicial writ amongst original writs; this equitable writ of vague and varied application amongst common law writs of sharp and terse significance; this confusion of equitable and legal jurisdiction. In Attorney General *v.* Blossom, the jurisdiction in question was *quo warranto*. And elaborately as the question was discussed by the able judge who wrote the opinion, he seems to have followed the framers of the constitution in a want of perception that the writ of injunction appeared to be illy grouped with *habeas corpus*, *mandamus*, *quo warranto* and *certiorari*, and that the court might be troubled some day, as it has been now, how to take jurisdiction of a writ not before jurisdictional; how to hear and determine a writ not before original. . . .

"All the other writs of the group are common law writs. The writ of injunction, when the constitution was adopted, was exclusively an equitable writ, used only by courts of chancery. As such it was given to this court, implying and carrying with it equitable jurisdiction to employ it. It is therefore plain that the original jurisdiction of this court is both legal and equitable, within certain limits; legal for the use of the common law writs; equitable for the use of the chancery writ. The use of the former must be according to the course of common law courts. The use of the latter, according to the course of courts of equity; in each case, subject to statutory modifications of the practice, which do not impair the jurisdiction granted. The common law writs, as already observed, imply and define the jurisdiction appurtenant to them, as jurisdictional writs. It is otherwise with the writ of injunction. Equity has no jurisdictional writs. By the course of courts of equity, the jurisdiction must precede the writ. And though the writ is the end of the equitable jurisdiction implied, the scope of the jurisdiction must be sought mainly outside of the writ itself. It can issue only after bill or information filed. And the question still remains, what is the original equitable jurisdiction conferred on the court, of bills or informations, dependent on the use of the writ?" Attorney General *v.* Railroad Companies, 35 Wis. 425, 512, 517.

confer general and unlimited jurisdiction to issue and determine writs of injunction or only to issue such writs in aid of its appellate jurisdiction and as in the nature of a prerogative writ. In some of the states it is held that such a grant of jurisdiction respecting writs of injunction does not confer general and unlimited power to issue such writs, but that by virtue of such legislation the writ becomes a *quasi* prerogative writ, and may be issued by the appellate court for public purposes and in aid of its appellate jurisdiction, but not for the protection of private property or private rights.[1]

[1] Attorney General *v.* Railroad Companies, 35 Wis. 425, 521; Attorney General *v.* City of Eau Claire, 37 Wis. 400, 406; Elliott's Appel. Proc., sec. 512; State *v.* Cunningham, 81 Wis. 440; 51 N. W. Rep. 724.

"The other courts may, indeed, adjudicate public as well as private questions; and the appellate and superintending jurisdiction of this court may therefore reach public as well as private interests. But the framers of the constitution, for greater security, added to these original jurisdiction over great public interests, for reasons already assigned. In a government like ours, public rights of the state and private rights of citizens often meet, and may well be involved in a single litigation. So it may be in the exercise of the original jurisdiction of the court. But it is safe to say that the constitution is content to intrust purely private rights to the appellate and superintending jurisdictions given, and to have granted the original jurisdiction of this court for the better and prompter and more authoritative protection of public interests. This is its primary and controlling object and character.

"This is very plainly implied by the grant of the writs of *habeas corpus*, *mandamus*, *quo warranto* and *certiorari*, as is well reasoned in Attorney-General *v.* Blossom. And, plainly recognizing the intention of the constitution to vest in this court one jurisdiction, by several writs, to be put to several uses, for one consistent, congruous, harmonious purpose, we must look at the writ of injunction in the light of that purpose, and seek its use in the kindred uses of the other writs associated with it. *Noscitur a sociis*, is an old and safe rule of construction, said to have originated with as great a lawyer and judge as Lord Hale, peculiarly applicable to this consideration. Lord Bacon gives the same rule in a more detailed form, more emphatic here. *Copulatio verborum indicat acceptationem in eodem sensu.* Here are several writs of defined and certain application classed with one of vague import. We are to be guided in the application of the uncertain, by its certain associates. The joinder of the doubtful writ with the defined writs operates to interpret and restrict its use, so as to be accepted in the sense of its associates; so that it and they may harmonize in their use, for the common purpose for which it is manifest that they were all given. And thus, in

And such a limitation upon the jurisdiction of the appellate courts, and upon the meaning to be conveyed by the general language used in such constitutional and stat-

this use and for this purpose, the constitution puts the writ of injunction to prerogative uses and makes it a *quasi* prerogative writ.

"There is the less difficulty in reaching this construction and giving definite meaning to the jurisdiction of injunction, because of the very contrast between this writ and *mandamus*. The latter commands. The former forbids. Where there is nonfeasance, *mandamus* compels duty. Where there is malfeasance, injunction restrains wrong. And so near are the objects of the two writs, that there is sometimes doubt which is the proper one; *injunction* is frequently mandatory, and *mandamus* sometimes operates restraint. In these very motions it was argued on one side that the remedy of the state is by *mandamus*, on the other that it is by injunction. And it is very safe to assume that the constitution gives *injunction* to restrain excess, in the same class of cases as it gives *mandamus* to supply defect; the use of the one writ or the other in each case turning solely on the accident of over-action or shortcoming of the defendant. And it may be that where defect and excess meet in a single case, the court might meet both, in its discretion, by one of the writs, without being driven to send out both, tied together with red tape, for a single purpose.

"This view excludes jurisdiction of injunction in private suits between private parties, proceeding on private right or wrong. In excluding them, we feel quite assured that we are only giving effect to the very purpose and limit of the constitution in the grant of jurisdiction. And we were aided in arriving at this conclusion, by decisions of the supreme court of Missouri, in somewhat analogous cases, excluding original jurisdiction of causes of merely private interest. State *v.* Stewart, 32 Mo. 379; State *v.* Lawrence, 38 id. 535; Foster *v.* State, 41 id. 61; Vail *v.* Dinning, 44 id. 210; State *v.* Vail, 53 id. 97. In our view, the jurisdiction of the writ is of a *quasi* prerogative writ. The prerogative writs proper can issue only at the suit of the state or the attorney-general in the right of the state; and so it must be with the writ of injunction, in its use as a *quasi* prerogative writ. All may go on the relation of a private person, and may involve private right. It is the duty of the court to confine the exercise of its original jurisdiction to questions *publici juris*. And hereafter the court will require all classes of cases, as it has hitherto done some, in which it is sought to put its original jurisdiction in motion, to proceed upon leave first obtained, upon a *prima facie* showing that the case is one of which it is proper for the court to take cognizance."

Attorney-General *v.* Railroad Companies, 35 Wis. 425, 518.

As to what are such matters of public concern as will call for the issuance of the writ by an appellate court under this construction, see Attorney-General *v.* City of Eu Claire, 37 Wis. 400, 407, 440.

utory provisions, would seem to be absolutely necessary to preserve and maintain the distinction between courts of original and those of appellate jurisdiction, and the extent and general character of the jurisdiction of each so clearly separated by constitutional provisions.[1]

Any other construction would vest appellate courts with unlimited original jurisdiction over a large and most important class of cases involving purely private rights.[2]

But the right of courts of last resort to issue injunctions is not always confined to their appellate jurisdiction. They may also be vested with original jurisdiction in certain actions and proceedings, and in connection with such jurisdiction may issue injunctions, as a part of their original jurisdiction in such cases.[3]

The right to appeal to a court of equity for injunctive relief is sometimes lost by the failure of the party seeking such aid to proceed in time. He must use reasonable diligence in making his application or the court will decline to exercise its jurisdiction.[4]

The power of courts to enjoin the collection of taxes

[1] Attorney-General *v.* Railroads, 35 Wis. 425, 521; Vail *v.* Dinning, 44 Mo. 210.

[2] In Elliott's Appellate Procedure, sec. 512, it is said: "It is entirely safe to affirm that a writ of injunction can not be issued save in the exercise of some function of appellate jurisdiction. Original jurisdiction can only be exercised by the courts to which original jurisdiction is confided by the constitution or the laws. Mischievous and evil results would inevitably follow from a blending of appellate and original jurisdiction, since the machinery of the appellate and trial courts is of such a radically different character. It is with reason, therefore, that the appellate tribunals are reluctant to exercise jurisdiction that is in its nature original. Sound principle, as well as wise policy, demands that these independent jurisdictions, for such they are, be kept separate, for deplorable consequences must, of necessity, result from blending them. The power to review is in its nature different from the power to originally try and decide, and only evil can flow from an attempt to break down the barrier which separates them. Such an attempt can only be arbitrary since there is no principle upon which a union of the two jurisdictions can be effected."

[3] Cooper *v.* City of Mineral Point, 34 Wis. 181.

[4] 10 Am. & Eng. Enc. of Law, 802; Sheldon *v.* Rockwell, 9 Wis. 166; 76 Am. Dec. 265.

needs to be specially noticed. The general rule on the subject is that the collection of a tax will not be enjoined upon the sole ground that the tax is irregular or illegal. There must be some special circumstances attending the sale which will distinguish it from a common trespass and bring it within some recognized head of equity jurisdiction before the preventive remedy of injunction may be invoked.[1]

The special circumstances attending the sale, or affecting the rights of the owner of property, which will authorize a court of equity to interfere by injunction are fraud, multiplicity of suits, irreparable injury, or a cloud upon title to real estate, or that the plaintiff is without an adequate remedy at law.[2]

And in this case the exceptions to the rule come very near to an entire extinguishment of the rule itself. But even with these important exceptions, the rule is not uniformly adhered to by the courts, and the right of a taxpayer to enjoin a tax sale, involving none of these equitable circumstances, is frequently maintained and enforced.[3]

[1] 10 Am. & Eng. Enc. of Law, 857; Warden *v.* Board of Supervisors, 14 Wis. 618; Mann *v.* Board of Education, 53 How. Pr. 289; Swinney *v.* Beard, 71 Ill. 27; Schulenberg, etc., Lumber Co. *v.* Town of Hayward, 20 Fed. Rep. 422; Hannewinkle *v.* Mayor, 15 Wall. 547; Susquehanna Bank *v.* Supervisors, 25 N. Y. 312; Douglass *v.* Town of Harrisville, 9 W. Va. 162; 27 Am. Rep. 548; Bogert *v.* City of Elizabeth, 25 N. J. Eq. 426; Dows *v.* Chicago, 11 Wall. 108; Savings & L. Society *v.* Austin, 46 Cal. 416; Central Pac. R. C. *v.* Corcoran, 48 Cal. 65; Corrothers *v.* Board of Education, 16 W. Va. 527; Hoagland *v.* Township of Delaware, 17 N. J. Eq. 106; Hallenbeck *v.* Hahn, 2 Neb. 377, 427; Schofield *v.* Watkins, 22 Ill. 66; Cooley on Tax. 536; State Railroad Tax Cases, 92 U. S. 575, 613.

[2] Judd *v.* Town of Fox Lake, 28 Wis. 583; Willard *v.* Comstock, 58 Wis. 565; 17 N. W. Rep. 401; Mann *v.* Board of Education, 53 How. Pr. 289; First National Bank *v.* Cook, 77 Ill. 622; Porter *v.* R. R. I. & St. L. R. R. Co., 76 Ill. 561; Hannewinkle *v.* Mayor, 15 Wall. 547; Douglass *v.* Town of Harrisville, 9 W. Va. 162; 27 Am. Rep. 548; Clarke *v.* Ganz, 21 Minn. 387; Dows *v.* Chicago, 11 Wall. 108; Minnesota, etc., Co. *v.* Palmer, 20 Minn. 468; Leitch *v.* Wentworth, 71 Ill. 146; Cooley on Tax. 536.

[3] Burnett *v.* Cincinnati, 3 Ohio, 73; 17 Am. Dec. 582; Mitchell *v.* Milwaukee, 18 Wis. 92; Bogert *v.* City of Elizabeth, 27 N. J. Eq. 568.

But this is a departure from the ancient equity rule on the subject, as the same is still adhered to in the federal courts. It is a departure, however, that is to be commended. A party whose property is about to be sold for an illegal or unauthorized tax, should not be compelled to see his property sold, without authority of law, and be denied preventive relief because it is unauthorized, and he may obtain relief, after the wrong is committed, by applying to a court of law. The only answer to this is the one of public policy which, it is said, should prevent the courts from interfering with the assessment and collection of the revenues necessary to carry on the government. This should have its weight, and courts should not interfere except in clear cases. But if it clearly appears that the tax is illegal and void, the property owner should have his remedy by injunction.[1]

[1] The correct rule is stated, it is believed, in Burnett *v.* Cincinnati, 3 Ohio, 73, 86; 17 Am. Dec. 582, 583, although the doctrine as there stated has not been generally accepted. The court say in that case:

"The bill, in this case, represents that under a proceeding altogether illegal and void, but, nevertheless, under legal color, the defendants are about to sell a part of the real estate of the complainant, and prays the interference of the court, in the exercise of its chancery powers to restrain them by injunction. The demurrer and the argument in support of it admit the truth of the allegations, and deny that this court can aid the party. If this be a tenable position, it results that public officers, having authority to operate upon the property of their fellow-citizens, must be permitted to proceed, however illegal, unjust, or oppressive their conduct may be. It follows, too, that the property of a citizen may be exposed to sale, under circumstances that render it impossible for the parties to know whether a title can pass or not. Thus involving great hazard to all concerned, and perplexing the titles to real estate, for no beneficial purpose to any person whatever. If such be the rule of the law, we must so administer it. But nothing short of a series of repeated adjudications would be sufficient to demonstrate that the law is so settled.

"The authorities which have been referred to do not lead to the conclusion insisted upon by the defendants. They all proceed upon the principle that in very many this court may interpose to prevent mischief, and to protect individuals in the enjoyment of their rights. Where aid has been decreed, it has always arisen from the circumstances of the particular case. And the confusion and seeming contradictions

If the tax is by way of a special assessment for public improvements, or the like, and it appears that the steps necessary to give the assessing officers jurisdiction have not been taken, or the necessary prerequisites to the making of the assessment are not shown, the proceeding will be enjoined.[1] But this is placed upon the ground that such a proceeding would create a cloud upon the title to real estate.

It has been held that where it appears that the established principles of taxation have been violated, and that actual injustice will ensue, or that the tax has been levied for an unauthorized purpose, equity will interfere in a proper case.[2] And where the claim of the adverse party, or the proceeding sought to be set aside is valid on its face and extrinsic facts are necesary to be proved in order to show the invalidity or illegality.[3]

in the cases are occasioned by the dicta of the judges, and not by any confliction in the principle decided.

"In regard to real estate, it is well established that chancery may interpose by injunction to prevent what is considered as destruction. But destruction, in the sense used, does not mean annihilation. It means no more than that injury which greatly impairs its intrinsic value. In a city the sale of a part of a lot for assessments may often be very destructive to the interest of the proprietor, though no title passed by such a sale. A cloud would be cast upon the title, which litigation only could remove, and until removed, the property might be valueless to the owner, subject, too, during the period of litigation, to additional assessments and embarrassments.

"When an assessment of a tax is made and its legality disputed, the uncertainty attendant upon the final result, puts the estate upon which it operates in imminent jeopardy. If no title passes by a sale, the party has a remedy at law. He can defend his possession; but if title do pass he is remediless altogether. A mode, therefore, of deciding the question before any right is affected, is safest for all parties."

See also, Culbertson *v.* Cincinnati, 16 Ohio, 574; Rhea *v.* Dick, 34 Ohio St. 420; City of Delphi *v.* Bowen, 61 Ind. 29; Milwaukee Iron Co. *v.* Town of Hubbard, 29 Wis. 51; Foster *v.* City of Kenosha, 12 Wis. 616; Williams *v.* Peinny, 25 Ia. 436; Wood *v.* Draper, 24 Barb. 187; Crawford *v.* Bradford, 23 Fla. 404; 2 Sou. Rep. 782.

[1] Dean *v.* City of Madison, 9 Wis. 402; Johnson *v.* City of Milwaukee, 40 Wis. 315.

[2] Warden *v.* Board of Supervisors, 14 Wis. 618; Mann *v.* Board of Education, 53 How. Pr. 289; Nunda *v.* Chrystal Lake, 79 Ill. 311.

[3] Mann *v.* Board of Education, 53 How. Pr. 289; Scribner *v.* Allen, 12

This doctrine rests upon the ground that such a sale would cast a cloud upon the title to the property sold and that the case falls under one of the well recognized heads of equity jurisdiction above mentioned.

If the tax is not absolutely void, but is irregularly or improperly assessed, a court of equity will not interfere except upon a showing that the tax attempted to be enforced is inequitable and unjust and its enforcement would be against conscience and good morals.[1]

So it is held that the power will only be exercised in the absence of fraud or like grounds for equitable interference, "in cases where the officers exceed their powers and levy, where they can, under the law, levy no such tax, because the tax is not authorized by the law; or where the persons attempting to make the levy are not officers *de jure* or *de facto;* or where the tax is levied on property wholly exempt; or where the law under which it is levied violates the rule of uniformity and is therefore unconstitutional."[2]

So where it is required by statute that the personal property of a delinquent tax-payer must be exhausted before resort can be had to his real estate it is held that the sale of real estate for the taxes will be enjoined where it appears that the owner has personal property out of which the tax could be made.[3]

A collector of taxes can not be enjoined from enforcement of the collection of a tax on a void levy, because, in such case, the officer is a trespasser and the party injured has an adequate remedy at law.[4] And it is usually held that a tax sale of property which would, upon the face of

Minn. 148; Liebenstein *v.* Mayor, 24 N. J. Eq. 200; Morris Canal, etc., Co. *v.* Jersey City, 12 N. J. Eq. 227; South Platte Land Co. *v.* Buffalo Co., 7 Neb. 253; Jenkins *v.* Board of Supervisors, 15 Wis. 11.

[1] Gulf Railroad Co. *v.* Morris, 7 Kan. 210, 229.

[2] Nunda *v.* Chrystal Lake, 79 Ill. 311; McConkey *v.* Smith, 73 Ill. 313; Coolbaugh *v.* Huck, 86 Ill. 600; Swinney *v.* Beard, 71 Ill. 27; Christie *v.* Malden, 23 W. Va. 667; Osborn *v.* Bank of United States, 9 Wheat. 738; Du Page County *v.* Jenks, 65 Ill. 275; Munson *v.* Minor, 22 Ill. 595; Union Trust Co. *v.* Weber, 96 Ill. 346; Winkler *v.* Halstead, 36 Mo. Ap. 25.

[3] Johnson *v.* Hahn, 4 Neb. 139; Abbott *v.* Edgerton, 53 Ind. 196.

[4] McPike *v.* Pew, 48 Mo. 525; Ritter *v.* Patch, 12 Cal. 298.

the proceedings, be void, will not be enjoined on the ground that a court of equity will not restrain acts which, when done, will injure no one.[1]

So it is held, in some of the states, that the fact that the property is exempt from taxation is not a ground for equitable interference by injunction where the fact must appear on the face of the tax deed, on the ground that such a deed would not create a cloud upon the title.[2]

The same considerations that will prevent a court of equity from enjoining a sale for taxes will also preclude it from preventing the application of moneys raised by taxation to the purposes for which it was assessed although such purpose is illegal.[3]

Suits for the purpose of restraining the assessment or collection of federal taxes are expressly forbidden by statute.[4] But a statute which would prevent a resort to a court of equity to enjoin the enforcement of an illegal tax, in a proper case, would be void under the constitutions of most of the states.[5]

The doctrine that injunction will not lie where there is an adequate remedy at law is applicable to tax sales.[6] So if a tax-payer is authorized by law to avoid the sale of his property by paying under protest and to recover the money

[1] Head *v.* James, 13 Wis. 641; Bucknall *v.* Story, 36 Cal. 67.

[2] Hollister *v.* Sherman, 63 Cal. 38; Archbishop *v.* Shipman, 69 Cal. 586, 591; 11 Pac. Rep. 343; The Hoboken Land & Imp. Co. *v.* Mayor, 31 N. J. Eq. 461; Heywood *v.* City of Buffalo, 14 N. Y. 534; Morris Canal, etc., Co. *v.* Jersey City, 12 N. J. Eq. 227.

[3] Kilbourne *v.* St. John, 59 N. Y. 21; 17 Am. Rep. 291.

The law of the several states, on this subject of enjoining the enforcement of taxes, as declared by the courts, will be found in 10 Am. & Eng. Enc. of Law, pp. 863 to 872, where the decisions are gathered in the foot-notes.

[4] Rev. Stat. U. S., sec. 3224; Schulenberg, etc., Lumber Co. *v.* Town of Hayward, 20 Fed. Rep. 422.

[5] Whittaker *v.* City of Janesville, 33 Wis. 76.

[6] T. B. Scott Lumber Co. *v.* Oneida County, 72 Wis. 158; 39 N. W. Rep. 343; De Witt *v.* Hays, 2 Cal. 463; 56 Am. Dec. 352; Robinson *v.* Gaar, 6 Cal. 273; Exchange Bank *v.* Hines, 3 Ohio St. 1; Brewer *v.* City of Springfield, 97 Mass. 152; Burnes *v.* Mayor, 2 Kan. 454; Sage *v.* Town of Fifield, 68 Wis. 546; 32 N. W. Rep. 629; Michael *v.* City of St. Louis, 18 S. W. Rep. 967; Boyd *v.* City of Selma, 11 Sou. Rep. 393.

so paid in an action at law, by showing the illegality of the tax, he is not entitled to an injunction.[1] And the rule is the same where an action could be maintained, at law, against the collecting officer, to recover the money collected, or for damages.[2]

The mere insolvency of the collecting officer, where there are no grounds for equitable interference, will not give a court of equity jurisdiction to enjoin the enforcement of the tax.[3]

If a tax is in part legal such part of the tax must be paid before the illegal portion of it can be enjoined.[4]

It is held, also, that equity will not restrain the execution of a deed of land sold for taxes on the ground that the tax proceedings were irregular or void, unless it also appear that such proceedings were inequitable and their continuance would be against conscience.[5]

If payment of the tax has been tendered either in money or in paper that the collecting officer is legally bound to accept in payment, the subsequent enforcement of the tax will be prevented by injunction.[6]

A court of equity has no jurisdiction to enjoin a wrongful seizure and sale of personal property for taxes except in rare cases, where the property has some peculiar intrinsic value to the owner that can not be compensated in damages.[7]

As to the power of the courts to enjoin the issuance and sale of municipal bonds the authorities do not agree. In

[1] Judd *v.* Town of Fox Lake, 28 Wis. 583; Sage *v.* Town of Fifield, 68 Wis. 546; 32 N. W. Rep. 629; Brewer *v.* City of Springfield, 97 Mass. 152; Wells Fargo & Co. *v.* Dayton, 11 Nev. 161.

[2] Wells Fargo & Co. *v.* Dayton, 11 Nev. 161; State Railroad Tax Cases, 92 U. S. 575, 613; Ritter *v.* Patch, 12 Cal. 298.

[3] Wells Fargo & Co. *v.* Dayton, 11 Nev. 161.

[4] 10 Am. & Eng. Enc. of Law, 863; City of Delphi *v.* Bowen, 61 Ind. 29; Brown *v.* Herron, 59 Ind. 61; Ottawa Glass Co. *v.* McCaleb, 81 Ill. 556; Albuquerque Nat. Bank *v.* Perea, 147 U. S. 87; 13 Sup. Ct. Rep. 194; Shepardson *v.* Gillett, 133 Ind. 125; 31 N. E. Rep. 788.

[5] Warden *v.* Board of Supervisors, 14 Wis. 618.

[6] Virginia Coupon Cases, 25 Fed. Rep. 654.

[7] Odlin *v.* Woodruff, 31 Fla. 160; 12 Sou. Rep. 227.

some of the cases it is held that if the bonds are void on their face their issuance and sale can not be enjoined, the doctrine being placed upon the ground that by the putting out of such a bond a property owner can not, by any possibility, be injured.[1] But the better rule is that the proper remedy of a property owner and tax-payer, where municipal bonds are about to be issued or sold, without authority of law, is by injunction.[2] And, unquestionably, this is so where the bonds, although unauthorized, will appear on their face to be valid and be enforceable in the hands of an innocent holder.[3] This, in some of the cases, is put upon the ground that the execution and delivery of negotiable securities under such circumstances would work irreparable injury and bring the case under that head of equity jurisdiction.[4]

The rule is firmly settled in some of the states that the issuance of void bonds can not be prevented by injunction on the ground that the tax-payers will, by reason of their issuance, be liable to subsequent taxation for an illegal purpose.[5] But this can not be so, in reason, where the bonds, when issued, will not be void on their face, but will, as negotiable paper, be binding in the hands of an innocent holder. Under such circumstances the only protection the tax-payer can have is by way of injunction.[6]

And if the bonds are issued for an unauthorized purpose, for example, for some public or other improvement, not connected with or a part of the corporate purposes of

[1] McCoy *v.* Briant, 53 Cal. 247.

[2] Whiting *v.* Sheboygan, etc., R. R. Co., 25 Wis. 167; 3 Am. Rep. 30; Judd *v.* Fox Lake, 28 Wis. 583; Lawson *v.* Schnellen, 33 Wis. 288; Lynch *v.* Eastern LaFayette & M. Ry. Co., 51 Wis. 430; 15 N. W. Rep. 743; Garrigus *v.* Board of Commissioners, 39 Ind. 66; Supervisors *v.* Mississippi, etc., R. Co., 21 Ill. 337; Marshall *v.* Silliman, 61 Ill. 218; Fowler *v.* City of Superior, 54 N. W. Rep. 800.

[3] Judd *v.* Town of Fox Lake, 28 Wis. 583; Sage *v.* Town of Fifield, 68 Wis. 546; 32 N. W. Rep. 629; Crampton *v.* Zabriskie, 101 U. S. 601.

[4] Judd *v.* Town of Fox Lake, 28 Wis. 583.

[5] Corwin *v.* Campbell, 45 How. Pr. 9; McCoy *v.* Briant, 53 Cal. 247; Polly *v.* Hopkins, 74 Tex. 145; 11 S. W. Rep. 1084.

[6] Polly *v.* Hopkins, 74 Tex. 145; 11 S. W. Rep. 1084.

the municipality authorizing their issue, the levy of a tax to pay them, or the application of money already collected, to their payment, will be enjoined.[1]

And whether the purpose for which the bonds are issued is a corporate one or not, if the proceedings under which they have been issued are void, the imposition of a tax to pay them will be enjoined.[2]

Respecting the power to enjoin judicial proceedings, the general rule is that one court will not interfere to prevent another court of concurrent or co-ordinate jurisdiction from proceeding in a cause or to control the process of such court.[3] And the rule is applicable, as between the state and federal courts.[4]

The right of the federal courts to issue writs of injunction to stay proceedings in the state courts is limited by statute to proceedings in bankruptcy.[5]

A court of equity first acquiring jurisdiction may enjoin proceedings in the same matter in another court.[6] And an injunction may be made to operate upon the party who is prosecuting or about to prosecute the action, on equitable grounds.[7] But, the right to apply to the courts for redress, is one that can not, in the absence of some equitable ground for denying the right, as, for example, matter of estoppel or the like, be prevented by the courts, however unfounded the claim for redress may be.[8]

[1] Livingston County *v.* Weider, 64 Ill. 427.

[2] Bronenburg *v.* Board of Commissioners, 41 Ind. 502; Marshall *v.* Silliman, 61 Ill. 218; Finney *v.* Lamb, 54 Ind. 1.

[3] Merrill *v.* Lake, 16 Ohio, 373, 404; 47 Am. Dec. 377; Sproehnle *v.* Dietrich, 110 Ill. 202; Platto v. Deuster, 22 Wis. 482; Dayton *v.* Relf, 34 Wis. 86; Endter *v.* Lennon, 46 Wis. 299; 50 N. W. Rep. 194; Orient Ins. Co. *v.* Sloan, 70 Wis. 611; 36 N. W. Rep. 388; Stein *v.* Benedict, 83 Wis. 603; 53 N. W. Rep. 891.

[4] Logan *v.* Lucas, 59 Ill. 237; Munson *v.* Harroun, 34 Ill. 422; 85 Am. Dec. 316; Sproehnle *v.* Dietrich, 110 Ill. 202; Akerly *v.* Vilas, 15 Wis. 401.

[5] Rev. Stat. U. S. 720; Dillon *v.* Kansas City, 43 Fed. Rep. 109.

[6] Akerly *v.* Vilas, 15 Wis. 401.

[7] Western R. R. Co. *v.* Nolan, 48 N. Y. 513; Ross *v.* Harper, 99 Mass. 175; Galveston H. & S. A. Ry. Co. *v.* Dowe, 70 Tex. 5; 7 S. W. Rep. 368.

[8] Brott *v.* Eager, 28 La. Ann. 262; Butchers Ass'n *v.* Cutler, 26 La. Ann. 500; State *v.* Rightor, 39 La. Ann. 619; 2 Sou. Rep. 385.

But it is held that where a suit has once been brought and dismissed the plaintiff will be enjoined from prosecuting a second action for the same cause until he has paid the costs in the first, on the ground that the second suit is vexatious.[1] And there may be other grounds upon which the prosecution of an action may be inequitable, or upon which it may be held that it is not being prosecuted in good faith, for the redress of an alleged injury, and which would warrant the interference of a court of equity to prevent the party from proceeding in court.[2]

The foundation of equitable jurisdiction, in this class of cases, is that the plaintiff has equitable rights of which he could not avail himself in defense of an action at law; that the prosecution of the suit at law is inequitable; and that a court of equity should interfere for his protection.[3]

It is held that no power exists in a court of equity to enjoin the prosecution of crimes or offenses in the common-law courts.[4] But this statement may be too broad. An illegal or void statute, or ordinance, may be used as a basis for a multiplicity of criminal prosecutions, instituted and carried on in bad faith, and which will result in irreparable injury. If so, there exists clear grounds for equitable interference by injunction.[5] The prosecution of a number of civil suits, involving the same questions, may be enjoined on like principles.[6] But the mere fact that the law under which the prosecutions are being carried on is, in the estimation of a court of equity, invalid, but has not

[1] Kitts *v.* Wilson, 89 Ind. 95.

[2] Galveston H. & S. A. Ry. Co. *v.* Dowe, 70 Tex. 5; 7 S. W. Rep. 368.

[3] Ross *v.* Harper, 99 Mass. 175.

[4] Suess *v.* Noble, 31 Fed. Rep. 855; Hemsley *v.* Meyers, 45 Fed. Rep. 283; In re Sawyer, 124 U. S. 210; 8 Sup. Ct. Rep. 482; Crighto *v.* Dahmer, 70 Miss. 602; 13 Sou. Rep. 237.

[5] Poyer *v.* Village of Desplaines, 123 Ill. 111; 13 N. E. Rep. 819; Davis *v.* Fasig, 128 Ind. 271; 27 N. E. Rep. 726; Mayor *v.* Radecke, 49 Md. 217; 33 Am. Rep. 239.

[6] Galveston H. & S. A. Ry. Co. *v.* Dowe, 70 Tex. 5; 7 S. W. Rep. 368; Cuthbert *v.* Chauvet, 14 N. Y. Supl. 62, 385.

been so declared, and a number of such prosecutions have been instituted under it, does not give the court power to enjoin such prosecution, because, in such case, the party has an adequate remedy at law.[1]

If the proceeding is to vacate or prevent the enforcement of a judgment, a court of equity, in such cases, proceeds upon purely equitable grounds, and unless it is shown that the enforcement of the judgment would be inequitable, the court will not interfore.[2] Nor will the court interpose to prevent the enforcement of a judgment for mere irregularities or defects in jurisdiction, or where the same appears to be void, if the judgment debtor has an adequate remedy at law, as, for example, by motion to vacate the judgment or by appeal.[3]

So it is held, generally, that a court of equity will not entertain a suit to enjoin a common law proceeding which is void for want of jurisdiction, on the ground that the party against whom the judgment is rendered may maintain an action for trespass against any officer who proceeds against his property under it as a trespasser, or contest the jurisdiction by *certiorari*, and because proceedings under a void judgment can not work irreparable injury.[4] But as to this the authorities are not agreed. In some of the cases, the jurisdiction to enjoin the enforcement of a void judgment is maintained without qualification.[5] An officer

[1] Poyer *v.* Village of Desplaines, 123 Ill. 111; 13 N. E. Rep. 819; Hottinger *v.* City of New Orleans, 42 La. Ann. 629; 8 Sou. Rep. 575.

[2] Thomas *v.* West, 59 Wis. 103; 17 N. W. Rep. 684; Marine Ins. Co. *v.* Hodgson, 7 Cranch, 332; Baragree *v.* Cronkhite, 33 Ind. 192; Huebschman *v.* Baker, 7 Wis. 542; Wright *v.* Eaton, 7 Wis. 595; Stokes *v.* Knarr, 11 Wis. 389.

[3] Thomas *v.* West, 59 Wis. 103; 17 N. W. Rep. 684; Schwab *v.* City of Madison, 49 Ind. 329; Baragree *v.* Cronkhite, 33 Ind. 192; Sims *v.* City of Frankfort, 79 Ind. 446; Stokes *v.* Knarr, 11 Wis. 389.

[4] St. Louis, etc., Ry. Co. *v.* Reynolds, 89 Mo. 146; 1 S. W. Rep. 208; Gillam *v.* Arnold, 32 S. Car. 503; 11 S. E. Rep. 331; Crandall *v.* Bacon, 20 Wis. 639; 91 Am. Dec. 451.

[5] Earl *v.* Matheney, 60 Ind. 202; Glass *v.* Smith, 66 Tex. 548; 2 S. W. Rep. 195.

may be enjoined from levying or enforcing an execution against one not a party to the suit.[1]

Where a party might have interposed the matter alleged in support of the injunction as a defense in the action in which the judgment was rendered, and was not prevented from doing so by any fraud or other wrongful act of the plaintiff, or by some other cause which would call for equitable relief, such as mistake or surprise or that the facts are newly discovered, or if he has made his defense and it has been decided against him, however erroneously, there is no ground for the interposition of a court of equity.[2] So where the court is asked to enjoin legal proceedings before the rendition of judgment, the injunction will not be granted where the grounds therefor may be used as a defense in the pending action.[3]

The rule is the same where the applicant for the injunction is not a party to the action at law, but is entitled to become a party on application and to assert his rights in such action.[4]

If a judgment has been satisfied, or the amount due upon it tendered in payment, a court of equity will enjoin proceedings upon it.[5] The right to enjoin the enforcement of judgments is sometimes limited by express statutory provisions.[6]

[1] Bishop *v.* Moorman, 98 Ind. 1; 49 Am. Rep. 731; Petry *v.* Ambrosher, 100 Ind. 510.

[2] Marine Ins. Co. *v.* Hodgson, 7 Cranch, 332; Martin *v.* Orr, 96 Ind. 27; High on Inj., sec. 89; Marsh *v.* Edgerton, 2 Pinney (Wis.), 230; Wright *v.* Eaton, 7 Wis. 595; Odum *v.* McMahon, 67 Tex. 292; 3 S. W. Rep. 286.

[3] Hartman *v.* Heady, 57 Ind. 545; Pennoyer *v.* Allen, 50 Wis. 308; 6 N. W. Rep. 887; Winterfield *v.* Stauss, 24 Wis. 394; Pardridge *v.* Brennan, 64 Mich. 575; 31 N. W. Rep. 524; Cohen *v.* L'Engle, 24 Fla. 542; 5 Sou. Rep. 235; 11 Sou. Rep. 47; Northern Pac. R. Co. *v.* Cannon, 49 Fed. Rep. 517; Dierks *v.* Commissioners, 142 Ill. 197; 31 N. E. Rep. 496; New Orleans, etc., Co. *v.* Lowenstein, 11 Sou. Rep. 187; Michael *v.* City of St. Louis, 18 S. W. Rep. 967; Joint School Dist. *v.* Reid, 82 Wis. 96; 51 N. W. Rep. 1089.

[4] Conner *v.* Covington, etc., Ry. Co., 19 S. W. Rep. 597.

[5] Bowen *v.* Clark, 46 Ind. 405.

[6] Phillips *v.* Pullen, 45 N. J. Eq. 157; 16 Atl. Rep. 915.

The right of courts of equity, unless enlarged by statute, to restrain or control the proceedings or acts of subordinate tribunals or officers exists only when such acts or proceedings affect real estate, and would lead to irreparable injury to the freehold, or to the creation of a cloud upon the title, or where they would lead to a multiplicity of suits.[1]

But where it becomes a question of the expenditure of public moneys, an injunction will lie to prevent the unauthorized expenditure of such funds by a public officer;[2] unless, as is shown above, he is applying the funds to purposes for which they were raised by taxation, in which case the application of them will be enjoined at the instance of a tax-payer only where the enforcement of the tax would have been enjoined and upon the same equitable principles.[3] And the performance of an act by the commissioners or supervisors of a county, or other governing municipal body which will, in the future, involve an unjust burden of taxation, may be prevented by the tax-payer by injunction.[4]

[1] Montague *v.* Horton, 12 Wis. 599; Judd *v.* Town of Fox Lake, 28 Wis. 583; Minnesota, etc., Co. *v.* Palmer, 20 Minn. 468.

"To the general rule, that the correction of errors, mistakes, and abuses in the exercise of the powers of subordinate public jurisdictions, and in the official acts of public officers, is a matter of legal and not equitable cognizance, three exceptions are recognized and established: *First*, where the proceedings in the subordinate tribunal, or the official acts of public officers, will necessarily lead to a multiplicity of suits. *Second*, where they lead, in their execution, to the irreparable injury to the freehold. *Third*, where the adverse party's claim to the land is valid upon the face of the instrument or proceedings sought to be set aside, and extrinsic facts are necessary to be proved, in order to establish the invalidity or illegality. Scribner *v.* Allen, 12 Minn. 148 (Gil. 85), and authorities cited." Minnesota, etc., Co. *v.* Palmer, 20 Minn. 468.

[2] City of Richmond *v.* Davis, 103 Ind. 449; 3 N. E. Rep. 130.

[3] Kilbourn *v.* St. John, 59 N. Y. 21.

[4] McCord *v.* Pike, 121 Ill. 288; 12 N. E. Rep. 259; Crampton *v.* Zabriskie, 101 U. S. 601; Winn *v.* Shaw, 87 Cal. 631; 25 Pac. Rep. 244, 968; Spilman *v.* City of Parkersburg, 35 W. Va. 605; 14 S. E. Rep. 279; Davenport *v.* Kleinschmidt, 6 Mont. 502; 13 Pac. Rep. 249; City of Valparaiso *v.* Gardner, 97 Ind. 1; 49 Am. Rep. 416.

In some of the states it is held that county comissioners or supervisors can not be enjoined from allowing an illegal claim against a county or the proper officer from issuing a warrant therefor or paying the same.[1] But the doctrine is without support in reason, and has been repudiated by the court by which it was promulgated, although it is said, in the later case, that the cases are, on the facts, distinguishable, which does not appear to be so as respects the principle involved.[2]

The general rule is that a court of equity has no power to inquire into the proceedings of subordinate tribunals of special or local jurisdiction, with a view to set them aside, if void at law, or for the purpose of staying or restraining such proceedings.[3] And if an adequate remedy at law exists, an injunction can not be had.[4] And in any event their action can not be prevented except upon a showing that they are acting without lawful authority or beyond the scope of their power,[5] or of fraud, collusion, or corruption.[6]

As a rule, the courts can not control official action by the executive or other independent department of the government by an injunction.[7]

Proceedings for an injunction can not be used as a means of determining title to an office, or for the removal of an officer, but may be resorted to for the protection of

[1] Linden *v.* Case, 46 Cal. 172; Merriam *v.* Board of Supervisors, 72 Cal. 517; 14 Pac. Rep. 137.

[2] Winn *v.* Shaw, 87 Cal. 631, 636; 25 Pac. Rep. 244, 968. See also Crampton *v.* Zabriskie, 101 U. S. 601; Barry *v.* Goad, 89 Cal. 215; 26 Pac. Rep. 785.

[3] Thatcher *v.* Dusenbury, 9 How. Pr. 32; Western R. R. Co. *v.* Nolan, 48 N. Y. 513; Bouton *v.* City of Brooklyn, 7 How. Pr. 198.

[4] Weber *v.* Timlin, 37 Minn. 274; 34 N. W. Rep. 29.

[5] Appeal of Delaware County, 119 Pa. St. 159; 13 Atl. Rep. 62; Murphy *v.* East Portland, 42 Fed. Rep. 308.

[6] Ziegler *v.* Chapin, 126 N. Y. 342; 27 N. E. Rep. 471; Union Steamboat Co. *v.* City of Chicago, 39 Fed. Rep. 723.

[7] *Ante*, sec. 29; Bates *v.* Taylor, 3 Pickle (Tenn.), 319; 11 S. W. Rep. 266; Fleming *v.* Guthrie, 32 W. Va. 1; 9 S. E. Rep. 23; Smith *v.* Myers, 109 Ind. 1; 9 N. E. Rep. 692.

the possession of an office in a *de facto* officer whose title is disputed, as well as in case of a *de jure* officer.[1]

The subject-matter of the jurisdiction of a court of chancery is civil property.[2] Therefore it has no jurisdiction in matters merely criminal or immoral, not affecting property,[2] nor of matters of a political character.[2]

The jurisdiction in this class of cases is strictly *in personam*, and, therefore, where the defendant is served with process within the jurisdiction of the court, the writ may issue to prevent him from interfering with or injuring property out of the state.[3]

Temporary injunctions or restraining orders may be granted without notice. But in some of the states an injunction can only be made to continue until notice to the opposite party and for a reasonable time within which to give such notice.[4] But notice may be waived as in other cases.[5]

80. MANDAMUS.—The writ of mandamus was formerly a common law writ.[6] In most of the states it is, at the present day, a statutory writ of a common law nature, and for the enforcement of legal, as distinguished from equitable, rights.[7] It was nominally, and in form, a prerogative writ, and allowable at the discretion of the court,[8] but really considered a writ of right.[9]

And at the present day it has come to be regarded and

[1] Guillotte *v.* Poincy, 44 La. Ann. 333; 6 Sou. Rep. 507; In re Sawyer, 124 U. S. 210; 8 Sup. Ct. Rep. 482.

[2] Sheridan *v.* Colvin, 78 Ill. 237, 246.

[3] Alexander *v.* Tolleston Club, 110 Ill. 65, 77.

[4] City of Columbus *v.* Hydraulic Woolen Mills Co., 33 Ind. 435.

[5] Hardy *v.* Donellan, 33 Ind. 501.

[6] 14 Am. & Eng. Enc. of Law, 91, 92; Chumasero *v.* Potts, 2 Mon. 242; Tobey *v.* Hakes, 54 Conn. 274; 7 Atl. Rep. 551.

[7] High Ext. Legal Rem., sec. 1.

[8] 14 Am. & Eng. Enc. of Law, 91, 92; Bath County *v.* Amy, 13 Wall. 244; Attorney-General *v.* Railroad Companies, 35 Wis. 425, 513; People *v.* Hatch, 33 Ill. 9; High Ext. Leg. Rem., sec. 3.

[9] Kendall *v.* United States, 12 Pet. 524, 614; Attorney-General *v.* Boston, 123 Mass. 460, 471; Rex *v.* Barker, 3 Burr. 1265, 1267.

treated, very generally, as a writ of right.[1] A contrary doctrine is stated in a very late work.[2] And the prerogative character of the writ is still maintained in some of the states for some purposes, and it is still so called in some of the cases.[3]

It is no doubt true that it is an extraordinary remedy, in the sense that it can not be resorted to where there is an adequate remedy by other and less summary means, but it does not follow that it is, for that reason, a prerogative writ, issuable only at the discretion of the court.[4] And while, in some of the cases, it is said that it is a prerogative writ, and not a writ of right, it is treated in the same cases as a writ of right.[5]

It is equally true that for certain purposes, affecting the public interests, the writ is essentially a prerogative writ when used for such purposes, but when used for the benefit of a private individual, and to enforce his rights, it has none of the elements of a prerogative writ.[6]

It is frequently said that the issuance of the writ is within the discretion of the court.[7] But this is not strictly true. Necessarily it is not true if the writ is one that may be demanded as of right. The better rule on the subject is that the issuance of the writ is within the legal discretion of the court, and the action of the court in refusing

[1] Kentucky *v.* Dennison, 24 How. 66; Fisher *v.* City of Charleston, 17 W. Va. 595; Union Pac. R. R. Co. *v.* Hall, 91 U. S. 343; Virginia *v.* Rives, 100 U. S. 313, 323; People *v.* Weber, 86 Ill. 283; State *v.* Board, 45 Ind. 501; Ex parte Commissioners, 112 U. S. 177; 5 Sup. Ct. Rep. 421; State *v.* Jennings, 56 Wis. 113; 14 N. W. Rep. 28; Wiedwald *v.* Dodson, 95 Cal. 450; 30 Pac. Rep. 580; High Ext. Leg. Rem., secs. 3, 4, 5.

[2] Elliott's Appell. Pro., sec. 517.

[3] Attorney-General *v.* Railroad Companies, 35 Wis. 425, 513; Attorney-General *v.* City of Eau Claire, 37 Wis. 400; Durand *v.* Saginaw Circuit Judge, 76 Mich. 624; Durand *v.* Gage, 43 N. W. Rep. 583; People *v.* Common Council, 78 N. Y. 56; Tobey *v.* Hakes, 54 Conn. 274; 7 Atl. Rep. 551.

[4] Ex parte Commissioners, 112 U. S. 177; 5 Sup. Ct. Rep. 421.

[5] People *v.* Common Council, 78 N. Y. 56.

[6] State *v.* Jennings, 56 Wis. 113; 14 N. W. Rep. 28; State *v.* Doyle, 40 Wis. 220.

[7] People *v.* Hatch, 33 Ill. 9.

it is subject to review, but will not be set aside except in a clear case of legal right to the remedy.[1]

The statutes of the several states providing for the writ differ somewhat in their language, but its objects and purposes, as defined and limited by statutory provisions, and the jurisdiction and powers of the courts respecting it, are essentially the same in all of the states.[2] And while, under the statutes the writ is, as has been said, treated as a writ of right and not as a prerogative writ, the causes for and the limitations upon the right to its issuance are the same, in all material respects, as at common law, so far as the general principles affecting the remedy are concerned.

The right to the writ depends upon the nature and character of the act sought to be enforced, and not upon the kind of officer against whom it runs.[3] Therefore, it may properly issue to enforce action by all classes of public officers, executive,[4] judicial,[5] administrative,[6] *quasi* judicial,[7] ministerial,[8] public corporations and their officers,[9]

[1] People *v.* Chapin, 104 N. Y. 96; 10 N. E. Rep. 141; State *v.* Board, 45 Ind. 501; People *v.* Common Council, 78 N. Y. 56; Attorney-General *v.* Boston, 123 Mass. 460, 471.

[2] Kendall *v.* United States, 12 Pet. 524; High Ext. Leg. Rem., secs. 8, 30.

[3] *Ante*, sec. 29; Kendall *v.* United States, 12 Pet. 524; Marbury *v.* Madison, 1 Cranch, 137, 171; State *v.* Crawford, 28 Fla. 441; 10 Sou. Rep. 118.

[4] *Ante*, sec. 29; State *v.* Governor, 5 Ohio St. 528, 534; Chamberlain *v.* Sibley, 4 Minn. 309; Kendall *v.* United States, 12 Pet. 524; Kentucky *v.* Dennison, 24 How. 66; Board of Directors *v.* Wolfley, 22 Pac. Rep. 383; State *v.* Nichols, 42 La. Ann. 209; 7 Sou. Rep. 738; State *v.* Thayer, 31 Neb. 82; 47 N. W. Rep. 704; Greenwood Cem. L. Co. *v.* Routt, 17 Colo. 156; 28 Pac. Rep. 1125.

[5] County of Cass *v.* Johnston, 95 U. S. 360; Virginia *v.* Rives, 100 U. S. 313, 323; People *v.* Hallett, 1 Colo. 352; Ex parte Burtis, 103 U. S. 238; Temple *v.* Superior Court, 70 Cal. 211; 11 Pac. Rep. 699; State *v.* District Court, 49 N. J. L. 537; 13 Atl. Rep. 43; Wood *v.* Lenawee Circuit Judge, 84 Mich. 521; 47 N. W. Rep. 1103.

[6] State *v.* Crawford, 28 Fla. 441; 10 Sou. Rep. 118.

[7] State *v.* County Court, 33 W. Va. 589; 11 S. E. Rep. 72; State *v.* Crites, 48 Ohio St. 460; 28 N. E. Rep. 178.

[8] People *v.* Loucks, 28 Cal. 69; People *v.* Hatch, 33 Ill. 9.

[9] Village of Glencoe *v.* People, 78 Ill. 382; People *v.* Hester, 6 Cal.

private corporations and their officers,[1] and by private persons[2] in proper cases. But the primary office of the writ is to compel the performance of a public duty, and the cases in which it will run against a private individual are extremely rare.[3]

The legal right to the performance of the duty must be clear;[4] an equitable right is not sufficient;[5] there must be no adequate remedy by the ordinary processes and proceedings at law for the failure to perform it;[6] and the act must be specific and one which the law imposes and leaves no discretion with respect to its performance.[7]

If the duty to act is imposed, but the question as to the manner of acting, or how the act shall be done, or the matter be decided, is left to the discretion or judgment of the court, officer, corporation, or person, action may be enforced, but the judgment or discretion of the tribunal,

680; Smalley *v.* Yates, 36 Kan. 519; 13 Pac. Rep. 845; Ray *v.* Wilson, 29 Fla. 342; 10 Sou. Rep. 613; Tennant *v.* Crocker, 85 Mich. 328; 48 N. W. Rep. 577; Attorney-General *v.* Boston, 123 Mass. 460, 470.

[1] Cross *v.* West Va., etc., Ry. Co., 35 W. Va. 174; 12 S. E. Rep. 1071; Ohio & M. Ry. Co. *v.* People, 121 Ill. 483; 13 N. E. Rep. 236; State *v.* Trustees, etc., 114 Ind. 389; 16 N. E. Rep. 808; Central Union Tel. Co. *v.* State, 118 Ind. 194; 19 N. E. Rep. 604; City Council *v.* Capital City Water Co., 92 Ala. 361; 9 Sou. Rep. 339; State *v.* Jacksonville St. R. Co., 29 Fla. 590; 10 Sou. Rep. 590; Slemmons *v.* Thompson, 31 Pac. Rep. 514; Haugen *v.* Albina L. & W. Co., 21 Or. 411; 28 Pac. Rep. 244; Combs *v.* Agricultural Ditch Co., 28 Pac. Rep. 966.

[2] State *v.* Shearer, 29 Neb. 477; 45 N. W. Rep. 784; People *v.* Williams, 33 N. E. Rep. 849; Nye *v.* Rose, 17 R. I. 733; 24 Atl. Rep. 777.

[3] Nye *v.* Rose, 17 R. I. 733; 24 Atl. Rep. 777.

[4] People *v.* Hatch, 33 Ill. 9; People *v.* District Court, 14 Colo. 396; 24 Pac. Rep. 260; Smalley *v.* Yates, 36 Kan. 519; 13 Pac. Rep. 845; People *v.* Board of State Canvassers, 129 N. Y. 360; 29 N. E. Rep. 345; Post *v.* Sparta, 63 Mich. 323; 29 N. W. Rep. 721.

[5] Burnsville Tp. Co. *v.* State, 119 Ind. 382; 20 N. E. Rep. 421.

[6] Kendall *v.* United States, 12 Pet. 524; State *v.* McGown, 89 Mo. 156; 1 S. W. Rep. 208; People *v.* Wiant, 48 Ill. 263; People *v.* Hatch, 33 Ill. 9; State *v.* Buhler, 90 Mo. 560; 3 S. W. Rep. 68.

[7] Napa Valley R. Co. *v.* Napa County, 30 Cal. 435; People *v.* District Court, 14 Colo. 396; 24 Pac. Rep. 260; People *v.* Whipple, 41 Mich. 548; 49 N. W. Rep. 922; Northern Pac. R. Co. *v.* Territory of Washington, 142 U. S. 492; 12 Sup. Ct. Rep. 283; High Ext. Leg. Rem., sec. 25.

officer, or person, as to how it shall be done, can not be controlled.[1]

Nor can the writ be used as a writ of error, or for the purpose of reversing or setting aside a decision rendered by an inferior court or tribunal in the exercise of its legitimate jurisdiction.[2]

But this rule is not without exception, as the writ is allowed to vacate or set aside a non-appealable order or to reverse a proceeding from which there is no appeal.[3] And some of the cases seem to go still further than this.[4] But whatever the nature of the office or the powers and duties of the officer, corporation, or person, the writ can issue only to enforce the performance of some duty growing out of the official position or station of such officer, corporation, or person.[5]

The general rule that the discretion of the lower court or tribunal can not be controlled by mandamus is subject to qualification. It is now pretty well settled that the writ will issue upon a showing of an abuse of discretion

[1] Newlin *v.* Indiana County, 123 Pa. St. 541; 16 Atl. Rep. 737; Dechert *v.* Commonwealth, 113 Pa. St. 229; 6 Atl. Rep. 229; Virginia *v.* Rives, 100 U. S. 313; Ex parte Burtis, 103 U. S. 238; Ex parte Flippin, 94 U. S. 348; State *v.* Board, 45 Ind. 501; People *v.* District Court, 14 Colo. 396; 24 Pac. Rep. 260; State *v.* Parish of St. Bernard, 39 La. Ann. 759; 2 Sou. Rep. 305; Shine *v.* Kentucky Cent. Ry. Co., 85 Ky. 177; 3 S. W. Rep. 18; Ex parte Parker, 120 U. S. 737; 7 Sup. Ct. Rep. 767; 131 U. S. 221; 9 Sup. Ct. Rep. 708; Ex parte Hayes, 92 Ala. 120; 9 Sou. Rep. 156; State *v.* Neville, 110 Mo. 345; 19 S. W. Rep. 491; Miller *v.* County Court, 34 W. Va. 285; 12 S. E. Rep. 702; High Ext. Leg. Rem., secs. 24, 42.

[2] Ex parte Flippin, 94 U. S. 348; Ex parte Burtis, 103 U. S. 238; Ex parte Railway Co., 101 U. S. 711, 720; People *v.* District Court, 14 Colo. 396; 24 Pac. Rep. 260; Scott *v.* Superior Court, 75 Cal. 114; 16 Pac. Rep. 547; Ex parte Hurn, 92 Ala. 102; 9 Sou. Rep. 515; State *v.* Barnes, 25 Fla. 298; 5 Sou. Rep. 722; Attorney-General *v.* Daboll, 90 Mich. 272; 51 N. W. Rep. 280.

[3] Chastain *v.* Armstrong, 85 Ala. 215; 3 Sou. Rep. 788; Ex parte Barnes, 84 Ala. 540; 4 Sou. Rep. 769; Palmer *v.* Jackson Circuit Court, 90 Mich. 1; 50 N. W. Rep. 1086; Richardson *v.* Farrar, 88 Va. 760; 15 S. E. Rep. 117; Ex parte Washington & G. R. Co., 140 U. S. 91; 11 Sup. Ct. Rep. 673.

[3] Lindsay *v.* Judges, 63 Mich. 735; 30 N. W. Rep. 590; Brown *v.* Kalamazoo Circuit Judge, 75 Mich. 274; 42 N. W. Rep. 827.

[5] Kendall *v.* United States, 12 Pet. 524; People *v.* Hatch, 33 Ill. 9.

where the act to be done rests in the legal discretion of of the court or officer proceeded against.[1]

The rule that the writ can not issue where there is an adequate remedy by the ordinary proceedings at law, is not uniformly enforced where the writ is sought against ministerial officers.[2] But the fact that the party has by neglect lost his right to resort to an appeal, or other remedy, will not entitle him to the writ.[3]

It is not sufficient to defeat the writ that the party applying for it has another remedy. Such other remedy must be efficient and adequate.[4]

In some of the states it is expressly provided by statute that the writ shall not be denied because of the fact that the petitioner has another specific legal remedy.[5] But the rule, independent of any statutory provision on the subject, is the other way, and it has not generally been changed by statute.

The writ can not issue for the enforcement of an obligation arising out of contract or affecting a mere private right not involving any trust or official duty.[6] Nor can it issue to compel action on the part of a corporation, public

[1] Village of Glencoe *v.* People, 78 Ill. 382; Raisch *v.* Board of Education, 81 Cal. 542; 22 Pac. Rep. 890; Lindsay *v.* Judges, 63 Mich. 735; 30 N. W. Rep. 590; City of Detroit *v.* Hosmer, 79 Mich. 384; 44 N. W. Rep. 622; People *v.* Board of Supervisors, 33 N. E. Rep. 827; City of Huron *v.* Campbell, 53 N. W. Rep. 182.

[2] Bidleman *v.* Brooks, 28 Cal. 72.

[3] State *v.* Buhler, 90 Mo. 560; 3 S. W. Rep. 68.

[4] Babcock *v.* Goodrich, 47 Cal. 488, 508; Raisch *v.* Board of Education, 81 Cal. 542; 22 Pac. Rep. 890; McLeod *v.* Scott, 21 Or. 94; 26 Pac. Rep. 1061; State *v.* Murphy, 19 Nev. 89; 6 Pac. Rep. 840; Gaines *v.* Caldwell, 148 U. S. 228; 13 Sup. Ct. Rep. 611; High Ex. Legal Rem., secs. 17, 18, 20.

[5] Ohio & M. Ry. Co. *v.* People, 121 Ill. 483; 13 N. E. Rep. 236; People *v.* Commissioners, 22 N. E. Rep. 596.

[6] State *v.* Turnpike Co., 16 Ohio St. 308; State *v.* Board, 45 Ind. 501; Tobey *v.* Hakes, 54 Conn. 274; 7 Atl. Rep. 551; State *v.* City of Kansas City, 38 Kan. 593; 17 Pac. Rep. 185; State *v.* Trustees, 114 Ind. 389; 16 N. E. Rep. 808; People *v.* Board of Education, 15 N. Y. Supl. 308; Florida Cent. & P. R. Co. *v.* State, 31 Fla. 482; 13 Sou. Rep. 103; High Ext. Legal Rem., sec. 25.

or private, or its officers, where the duty to act is not imposed by law, but is a mere contractual obligation.[1]

It is generally said that only ministerial duties can be enforced by mandamus.[2] In one sense this is true, because it is usually ministerial duties about which no discretion or judgment is required or can be exercised.[2] But the writ is just as applicable for the enforcement of judicial or other official duties, with the limitation above stated as to the power to control the discretion of the court or officer with respect to the manner of doing the act or how the question to be acted upon shall be decided.[3]

Thus a court may, by mandamus, be compelled by a higher court to act in a matter purely judicial, involving the decision of causes or questions growing out of them, but it can not be compelled to decide any question which such court has the power to determine in any particular way,[4] nor compel the court to rehear a cause that it has already decided.[5] Therefore a judge who declines to act at all, on the ground that he is disqualified, or that the court has not jurisdiction, may, upon a showing that he is not legally disqualified, or that the court has jurisdiction, be compelled to proceed in a cause.[6]

[1] State *v.* Trustees, 114 Ind. 389; 16 N. E. Rep. 808; State *v.* City of Kansas City, 38 Kan. 593; 17 Pac. Rep. 185; People *v.* Board of Education, 15 N. Y. Supl. 308.

[2] *Ante* sec. 29.

[3] *Ante* sec. 29; Kendall *v.* United States, 12 Pet. 524; Virginia *v.* Rives, 100 U. S. 313; Temple *v.* Superior Court, 70 Cal. 211; 11 Pac. Rep. 699; People *v.* District Court, 14 Colo. 396; 24 Pac. Rep. 260; Ex parte Parker, 120 U. S. 737; 7 Sup. Ct. Rep. 767; 131 U. S. 221; 9 Sup. Ct. Rep. 708; State *v.* Crawford, 28 Fla. 441; 10 Sou. Rep. 118; State *v.* Murphy, 19 Nev. 89; 6 Pac. Rep. 840.

[4] Newlin *v.* Indiana County, 123 Pa. St. 541; 16 Atl. Rep. 737; People *v.* District Court, 14 Colo. 396; 24 Pac. Rep. 260; Commonwealth *v.* McLaughlin, 120 Pa. St. 518; 14 Atl. Rep. 377; State *v.* Murphy, 41 La. Ann. 526; 6 Sou. Rep. 816.

[5] State *v.* Monroe, 39 La. Ann. 664; 2 Sou. Rep. 215.

[6] *Ante* sec. 62, pp. 408, 411; Ex parte State Bar Ass'n, 92 Ala. 113; 8 Sou. Rep. 768; Temple *v.* Superior Court, 70 Cal. 211; 11 Pac. Rep. 699; Beguhl *v.* Swan, 39 Cal. 411; People *v.* Swift, 59 Mich. 529; Prosecuting Attorney *v.* Judge, 26 N. W. Rep. 694; State *v.* Ellis, 41 La. Ann. 41; 6 Sou. Rep. 55; Ex parte Parker, 120 U. S. 737; 7 Sup. Ct. Rep. 767; State

So, where a special judge refuses to act on the ground that the regular judge is not disqualified,[1] or a court refuses to take jurisdiction of a cause sent to it upon change of venue on the ground that the change was not properly taken.[2]

So a court may be compelled by mandamus to dismiss an appeal from an order not appealable,[3] or to impose sentence in a criminal case,[4] or to allow an appeal where the party is entitled thereto and has properly applied therefor;[5] but not where the granting of the appeal is within the discretion of the court;[6] or to vacate a decree rendered without a hearing and hear the cause on its merits;[7] or to entertain an appeal properly taken;[8] or to enter a proper judgment upon a decision rendered and enforce it by execution.[9]

But it is held that where an appeal has been dismissed upon a hearing, although upon the ground of want of jurisdiction, if wrongly dismissed, the action of the court is a mere error which can not be remedied by mandamus.[10] This may be the correct rule where the question turns upon some fact to be ascertained and determined by the court, affecting its jurisdiction to entertain the appeal, or

v. Eddy, 10 Mont. 311; 25 Pac. Rep. 1032; State *v.* Field, 107 Mo. 445; 17 S. W. Rep. 896; State *v.* Young, 31 Fla. 594; 12 Sou. Rep. 673; State *v.* Hunter, 3 Wash. St. 92; 27 Pac. Rep. 1076.

[1] *Ante* sec. 61, p. 395; Schultz *v.* McLeary, 73 Tex. 92; 11 S. W. Rep. 924; Ex parte Parker, 120 U. S. 737; 7 Sup. Ct. Rep. 767; 131 U. S. 221; 9 Sup. Ct. Rep. 708.

[2] State *v.* O'Bryan, 102 Mo. 254; 14 S. W. Rep. 933.

[3] Palmer *v.* Jackson Circuit Judge, 90 Mich. 1; 50 N. W. Rep. 1086.

[4] People *v.* Court of Sessions, 19 N. Y. Supl. 508.

[5] State *v.* Murphy, 41 La. Ann. 526; 6 Sou. Rep. 816.

[6] Smith *v.* Reilly, 82 Mich. 93; 45 N. W. Rep. 1122.

[7] Brown *v.* Kalamazoo Circuit Judge, 75 Mich. 274; 42 N. W. Rep. 827.

[8] Ex parte Parker, 120 U. S. 737; 7 Sup. Ct. Rep. 767; 131 U. S. 221; 9 Sup. Ct. Rep. 708.

[9] State *v.* Engle, 127 Ind. 457; 26 N. E. Rep. 1077; Anderson *v.* Pennie, 32 Cal. 266.

[10] People *v.* Garnett, 130 Ill. 340; 23 N. E. Rep. 331; Treadway *v.* Wright, 4 Nev. 119; People *v.* Weston, 28 Cal. 640. See, also, State *v.* Neville, 110 Mo. 345; 19 S. W. Rep. 491.

where the dismissal is upon a hearing on the merits,[1] but not otherwise. If it is a pure question of law, and the court holds that it has not jurisdiction of the cause, and for that reason dismisses the appeal, thus depriving the party of a hearing, the clear weight of authority and reason is to the effect that the court may be required, by mandamus, to vacate the order dismissing the appeal, and proceed with the hearing. It is nothing more nor less than a refusal to proceed in the action, and is within the general rule above laid down that where a court refuses to act on the ground that it has not jurisdiction it may be compelled to do so.[2]

The cases given in which inferior courts will be coerced to act are stated merely as illustrative of the general rule on the subject, and as tending to show to what extent the superior courts may go in such cases, not with a view of stating, in detail, the particular cases in which such power may be exercised.

The regular judge may be compelled, by mandamus, to give way to a special judge where such regular judge is disqualified,[3] or to certify the cause to another court where the law requires it.[4]

If the act is one about which the court or judge can have no discretion, or is not called upon or permitted to exercise its or his judgment, the act, although to be performed by a court or judicial officer, is essentially a ministerial act which may be enforced, absolutely, as in case of a purely ministerial duty. And this same rule,

[1] Morrison *v.* District Court, 147 U. S. 14; 13 Sup. Ct. Rep. 246.

[2] In the case of Ex parte Parker, above cited, the supreme court of Washington Territory had decided, upon a hearing, that the appeal had not been properly taken, and that, therefore, it had no jurisdiction. But the supreme court of the United States held that mandamus was the proper remedy. And the distinction between a case where the court has taken jurisdiction, and subsequently dismisses the appeal, and one where it decides, at the outset, that it has not jurisdiction, and for that reason refuses to entertain the appeal, is clearly pointed out. See, also, as bearing upon the question, generally, State *v.* Field, 107 Mo. 445; 17 S. W. Rep. 896.

[3] *Ante* sec. 62, p. 411; State *v.* Judge, 39 La. Ann. 994; 3 Sou. Rep. 91.

[4] Graham *v.* People, 111 Ill. 253.

and the distinctions between purely ministerial, and other acts involving judgment and discretion and the limitations upon the enforcement of the latter, are applicable to other departments of government as well as to the judicial department.[1]

If the duty to act is imperative, no matter what the character of the act may be, action may be enforced. But if the discretion allowed, or the judgment to be exercised is as to whether the court, officer, or person shall act at all or not, and not as to the manner of doing it, the writ can not be used to enforce action in any form, because that would be to control the judgment or discretion of another court or officer which is never allowed.[2]

Ministerial, judicial, legislative, and executive duties have been defined and the distinctions respecting them pointed out in another section.[3] The extent to which the courts may go in enforcing action by officers of the executive department has also been considered.[3] It is held in some of the states that the courts have no such power, even in case of ministerial duties.[4] But the great weight of the authorities is undoubtedly to the effect that where purely ministerial duties are imposed by law upon executive officers, such duties may be enforced by the courts.[5]

The most difficult question for the courts in such cases is to determine what are and what are not such ministerial acts of executive officers as are within the control

[1] *Ante* sec. 29; Kendall *v.* United States, 12 Pet. 524.

[2] *Ante* sec. 29; Bledsoe *v.* Int. R. R. Co., 40 Tex. 556; Newlin *v.* Indiana County, 123 Pa. St. 541; 16 Atl. Rep. 737; State *v.* Parish of St. Bernard, 39 La. Ann. 759; 2 Sou. Rep. 305; Willard *v.* Superior Court, 82 Cal. 456; 22 Pac. Rep. 1120; State *v.* Murphy, 41 La. Ann. 526; 6 Sou. Rep. 816; People *v.* Court of Sessions, 19 N. Y. Supl. 508; People *v.* Maher, 19 N. Y. Supl. 758; State *v.* Murphy, 19 Nev. 89; 6 Pac. Rep. 840.

[3] *Ante* sec. 29.

[4] Rice *v.* Austin, 19 Minn. 103; 18 Am. Rep. 330; State *v.* Whitcombe, 28 Minn. 50; 8 N. W. Rep. 902; State *v.* Braden, 40 Minn. 174; 41 N. W. Rep. 817; Hovey *v.* State, 127 Ind. 588; 27 N. E. Rep. 175.

[5] See the authorities cited above in this section and section 29 *ante*, where the authorities on the subject are reviewed. See also State *v.* Warmouth, 22 La. Ann. 1; State *v.* Board of Liquidation, 42 La. Ann. 647; 7 Sou. Rep. 706; State *v.* Nicholls, 42 La. Ann. 209; 7 Sou. Rep. 738.

of the courts.[1] The writ is frequently used to enforce the payment of amounts due from public corporations, and to compel the proper authorities to levy a tax for such purpose. But it can not be so used for the collection of a simple debt from a municipal corporation which may be enforced in an ordinary action.[2]

In the federal courts a judgment for the amount claimed must first be obtained and the mandamus is treated as in effect an execution to enforce the judgment.[3] The general rule is that the writ will not be awarded to try the title to an office.[4] A different rule is maintained, however, in some of the states.[5] And it may, in a proper case, be used to compel the restoration to office of a rightful incumbent who has been deprived thereof by removal or suspension,[6] or to enforce the delivery of the possession of an office and of the books, papers and property pertaining thereto,[7] or to compel the delivery of a certificate of election.[8]

So an attorney who has been suspended from practice by a void judgment may be restored by mandamus.[9] And one who, possessing the necessary qualifications, has been

[1] State *v.* Board of Liquidation, 42 La. Ann. 647; 7 Sou. Rep. 706; State *v.* Mason, 43 La. Ann. 590; 9 Sou. Rep. 776.

[2] State *v.* City of Kansas City, 38 Kan. 593; 17 Pac. Rep. 185.

[3] County of Greene *v.* Daniel, 102 U. S. 187, 195; Davenport *v.* County of Dodge, 105 U. S. 237; United States *v.* Johnson County, 6 Wall. 166; Aylesworth *v.* Gratiot County, 43 Fed. Rep. 350; Aspinwall *v.* County Commissioners, 2 Fed. Cases, 67; Stewart *v.* Justices of St. Clair Co. Court, 47 Fed. Rep. 482.

[4] Ex parte Lusk, 82 Ala. 519; 2 Sou. Rep. 140; State *v.* Palmbeck, 36 Neb. 401; 54 N. W. Rep. 667.

[5] Luce *v.* Board of Examiners, 153 Mass. 108; 26 N. E. Rep. 419; Keough *v.* Board of Aldermen, 156 Mass. 403; 31 N. E. Rep. 387.

[6] Ex parte Lusk, 82 Ala. 519; 2 Sou. Rep. 140; State v. Shakespeare, 43 La. Ann. 92; 8 Sou. Rep. 893.

[7] State *v.* Oates, 57 N. W. Rep. 296; Huffman *v.* Mills, 39 Kan. 577; 18 Pac. Rep. 516; Driscoll *v.* Jones, 1 S. Dak. 8; 44 N. W. Rep. 726; State *v.* Mayor, 52 N. J. Law, 332; 19 Atl. Rep. 780; State *v.* May, 106 Mo. 488; 17 S. W. Rep. 660; Strong, Petitioner, 37 Mass. 484, 495.

[8] Strong, Petitioner, 37 Mass. 484, 496.

[9] Walls *v.* Palmer, 64 Ind. 493; State *v.* Finley, 30 Fla. 302; 11 Sou. Rep. 500.

elected to an office may be compelled by mandamus to accept the same.[1]

The federal circuit and district courts have no jurisdiction to issue the writ as an original proceeding, nor at all except when necessary to the exercise of their jurisdictions.[2] But while the circuit courts of the United States have no original jurisdiction to award the writ, and their power to award the same is purely ancillary, they are not confined in awarding it to parties to the judgment to be enforced.[3] Jurisdiction to issue the writ does exist in the supreme court of the District of Columbia in cases in which parties are, by the common law, entitled to it.[4]

The power to issue the writ is given in most of the states to appellate courts. But in some of the states the power can only be used in the exercise of the appellate jurisdiction of the court,[5] in others only in specified cases,[6] or, in some of the states, as a prerogative writ affecting matters of public concern, and not for the enforcement of mere private rights.[7] But in other states appellate courts are given, by the constitution, control and supervision over all inferior courts, and the jurisdiction thus granted is held to be exclusive,[8] or, if not exclusive, original and not limited to courts from which appeals may be taken to such courts.[9]

[1] People *v.* Williams, 145 Ill. 573; 33 N. E. Rep. 849.

[2] Bath County *v.* Amy, 13 Wall. 244; M'Intire *v.* Wood, 7 Cranch, 504; M'Clung *v.* Silliman, 6 Wheat. 601; Graham *v.* Norton, 15 Wall. 427; Rev. Stat. U. S., sec. 716; United States *v.* Johnson County, 6 Wall. 166; In re Vintschger, 50 Fed. Rep. 459; High Ext. Legal Rem., sec. 29.

[3] Labette County *v.* United States, 112 U. S. 217; 5 Sup. Ct. Rep. 108.

[4] United States *v.* Schurz, 102 U. S. 378, 394.

[5] Elliott App. Pro., secs. 511, 516; Central R. & B. Co. *v.* Miller, 16 S. E. Rep. 256; Grigsby *v.* Bowles, 79 Tex. 138; 15 S. W. Rep. 30.

[6] State *v.* Clay, 3 Wyo. 393; 31 Pac. Rep. 409.

[7] *Ante*, sec. 79; Attorney-General *v.* Railway Companies, 35 Wis. 425; Attorney-General *v.* City of Eau Claire, 37 Wis. 400.

[8] State *v.* Judge, 39 La. Ann. 97; 1 Sou. Rep. 281.

[9] State *v.* Kansas City Court of Appeals, 97 Mo. 331; 10 S. W. Rep. 855; State *v.* Tracy, 94 Mo. 217; 6 S. W. Rep. 709; City of Huron *v.* Campbell, 53 N. W. Rep. 182; Attorney-General *v.* Boston, 123 Mass. 460, 471; Strong, Petitioner, 37 Mass. 484, 495.

A more limited rule has been laid down in some of the states, the power of the appellate courts being confined to matters directly affecting the proper discharge of their duties as such appellate courts.[1] A grant of appellate jurisdiction vests the court with no power to issue writs of mandamus except in aid of such jurisdiction.[2]

An appellate court, like any other, has the inherent power to compel compliance with its mandates, and to enforce its authority by mandamus in proper cases.[3] And this is a right of which it can not be deprived by statute.[4]

It is a right which, in the courts of last resort, extends to a general supervision and control over inferior courts and tribunals within their jurisdiction, and from which an appeal will lie to such courts.[5]

This is for the reason that every obstacle to the trial and disposition of a cause in the lower courts has the effect to delay or prevent a hearing and decision by the appellate court.[6]

It has been held that, where an appellate court is given common-law jurisdiction by the constitution, this general grant vests the court with power to issue writs of mandamus, and that the power, being constitutional, can not be taken away by statute.[7]

[1] State *v.* Biddle, 36 Ind. 138. It is said by the learned authors in Elliott's Appellate Procedure, in commenting upon the case just cited, that it is in conflict with State *v.* Board, 45 Ind. 501, and Moore *v.* State, 72 Ind. 358; but this does not seem to be so, as in neither of the cases referred to was the application for the writ to the appellate court, nor was any question presented respecting the jurisdiction of that court to issue the writ. Both of the cases were on appeal from a judgment in a lower court in a proceeding for a mandamus.

[2] Hawes *v.* People, 124 Ill. 560; 17 N. E. Rep. 13; High Ext. Leg. Rem., sec. 27.

[3] Ex parte Railway Co., 101 U. S. 711; Elliott's App. Pro., secs. 504-506; State *v.* Judge, 12 Sou. Rep. 941.

[4] *Ante*, sec. 27.

[5] Elliott's App. Pro., secs. 514, 516; People *v.* Swift, 59 Mich. 529; Prosecuting Attorney *v.* Judge, 26 N. W. Rep. 694; State *v.* Judge, 12 Sou. Rep. 941.

[6] Elliott's App. Pro., sec. 516.

[7] Chumasero *v.* Potts, 2 Mon. 242, 249.

But if the common-law jurisdiction given is not original, but appellate only, the subject of original jurisdiction in mandamus, except so far as such jurisdiction is inherent in the court, is under legislative control. And if the general grant of jurisdiction is to the court as one of appellate and not of original jurisdiction, the power to issue writs of mandamus must properly be confined to the issuance of such writs in matters pertaining to its appellate jurisdiction, as above stated.

Jurisdiction as against non-residents may be obtained by publication.[1]

With respect to the power of superior courts to supervise and control the acts of inferior courts, their jurisdiction is confined to such courts as are within their territorial jurisdiction.[2]

Proceedings for the writ are not special cases and are not within the jurisdiction of inferior courts having power to act in certain specified cases, not including mandamus, and in "special cases."[3]

Power to issue alternative writs of mandamus is usually given to judges at chambers.[4] And in some of the states they are authorized to issue peremptory writs.[5] The power to issue the writ is usually confined to courts of superior jurisdiction.[6]

81. Prohibition.—The writ of prohibition was formerly a common law writ.[7] But it has, at the present day, become almost wholly statutory, in the sense that it is defined and the grounds for its issuance specifically provided for by statute. This is not true as to all of the states, however. In some of the states the statutes simply allow the

[1] Cross *v.* West Va., etc., Ry. Co., 35 W. Va. 174; 12 S. E. Rep. 1071.

[2] Shields *v.* State, 86 Ala. 584; 6 Sou. Rep. 271.

[3] *Ante*, sec. 68; People *v.* Kern County, 45 Cal. 679. But see People *v.* Day, 15 Cal. 91.

[4] *Ante*, sec. 58; State *v.* Board of Canvassers, 31 Pac. Rep. 879.

[5] Linch *v.* State, 30 Neb. 740; 47 N. W. Rep. 88.

[6] School Inspectors *v.* People, 20 Ill. 526.

[7] High Ext. Leg. Rem., sec. 762; Connecticut River R. R. *v.* County Commissioners, 127 Mass. 50, 57; 34 Am. Rep. 338.

writ, but do not point out the causes for which it may issue.[1]

The object of the writ, under these statutory provisions, as well as at common law, is to restrain subordinate judicial tribunals, of every kind, from acting without jurisdiction,[2] or, where they have jurisdiction, from exceeding such jurisdiction.[3] But the writ may run against tribunals other than courts. In some of the statutes or codes of the states it is provided that the writ may issue to "a corporation, board or person" as well as to courts. And under, or independently of, such statutory provisions the writ may be proper and necessary to prevent judicial action by *quasi* judicial, or even purely ministerial officers who assume to exercise judicial functions.[4] But the power of a certain court may be, and sometimes is, confined to the issuance of the writ to courts alone.[5]

Notwithstanding such statutory provisions the general nature of the writ remains the same.[6] Its sole object is still to prevent action by an inferior tribunal, or corporation, body or person claiming to be such, where it has no jurisdiction to act. And the act to be prevented must necessarily be judicial in its nature and not ministerial, whatever may be the character of the tribunal assuming

[1] Board of Commissioners *v.* Spitler, 13 Ind. 235, 239; County Court *v.* Boreman, 34 W. Va. 362; 12 S. E. Rep. 490.

[2] High Ext. Leg. Rem. sec. 762; City of Coronado *v.* City of San Diego, 97 Cal. 440; 32 Pac. Rep. 518; Thomson *v.* Tracy, 60 N. Y. 31, 37; Spring Valley Water Works *v.* San Francisco, 52 Cal. 111, 117; State *v.* Houston, 40 La. Ann. 393; 4 Sou. Rep. 50.

[3] Appo *v.* People, 20 N. Y. 531, 540; Thomson *v.* Tracy, 60 N. Y. 31, 37; People *v.* Nichols, 79 N. Y. 582, 591; McConiha *v.* Guthrie, 21 W. Va. 134, 141; Bruner *v.* Superior Court, 92 Cal. 239, 251; 28 Pac. Rep. 341; Hayne *v.* Justices Court, 82 Cal. 284; 23 Pac. Rep. 125.

[4] Fleming *v.* Commissioners, 31 W. Va. 608; 8 S. E. Rep. 267, 270; State *v.* Young, 29 Minn. 474; 9 N. W. Rep. 737, 739.

[5] Hunter *v.* Moore, 17 S. E. Rep. 797; State *v.* City Council of Columbia, 16 S. Car. 412; 17 S. Car. 80.

[6] Hobart *v.* Tillson, 66 Cal. 210; 5 Pac. Rep. 83; Thomson *v.* Tracy, 60 N. Y. 31, 37; McConiha *v.* Guthrie, 21 W. Va. 134, 141; State *v.* Gary, 33 Wis. 93; Maurer *v.* Mitchell, 53 Cal. 289; State *v.* Rombauer, 104 Mo. 619; 15 S. W. Rep. 850.

the right to perform it.[1] And where jurisdiction to issue the writ is given by the constitution it is held to mean the common law writ, and that the legislature has no power to extend its office so as to authorize its use to prevent ministerial as well as judicial acts.[2]

It is held otherwise under a constitution giving common law jurisdiction, and a statute extending the writ to ministerial acts has been upheld under such a constitutional provision.[3] The writ can not issue against a legistive body to prevent legislation with reference to matters of public interest.[4] It is a preventive writ and can not issue after the act complained of has been done.[5] It can only operate to restrain an inferior court from exercising its jurisdiction in a particular case, and can not be used to prevent the institution of an action.[6]

But further action may be arrested at any stage of the proceedings. Therefore the writ may issue, after the rendition of judgment, to prevent its enforcement.[7] And if the unauthorized acts of the court are only partially completed the writ will issue not only to prevent what has not been done, but, in connection with such relief, to nullify what has already been accomplished.[8]

[1] High Ext. Leg. Rem., sec. 769; Camron *v.* Kenfield, 57 Cal. 550; Maurer *v.* Mitchell, 53 Cal. 289; City of Coronado *v.* City of San Diego, 97 Cal. 440; 32 Pac. Rep. 518; Thomson *v.* Tracy, 60 N. Y. 31, 37; Ex parte Braudlacht, 2 Hill (N. Y.), 593; 38 Am. Dec. 593; State *v.* Gary, 33 Wis. 93; State *v.* Clarke Co. Ct., 41 Mo. 44; State *v.* Houston, 40 La. Ann. 393; 4 Sou. Rep. 50; Fleming *v.* Commissioners, 31 W. Va. 608; 8 S. E. Rep. 267, 270, 272; In re Radl, 57 N. W. 1105.

[2] Maurer *v.* Mitchell, 53 Cal. 289; Camron *v.* Kenfield, 57 Cal. 550; Hobart *v.* Tillson, 66 Cal. 210; 5 Pac. Rep. 83; Farmers' Union *v.* Thresher, 62 Cal. 407.

[3] Ducheneau *v.* House. 4 Utah, 369; 10 Pac. Rep. 838.

[4] Spring Valley Water Works *v.* San Francisco, 52 Cal. 111, 117.

[5] State *v.* Superior Court, 2 Wash. St. 9; 25 Pac. Rep. 1007; Haldeman *v.* Davis, 28 W. Va. 324.

[6] Haldeman *v.* Davis, 28 W. Va. 324.

[7] Hein *v.* Smith, 13 W. Va. 358, 370; Ensign Mfg. Co. *v.* McGinnis, 30 W. Va. 532; 4 S. E. Rep. 782; Bodley *v.* Archibald, 33 W. Va. 229; 10 S. E. Rep. 392.

[8] Havemeyer *v.* Superior Court, 84 Cal. 327, 390, 394; 24 Pac. Rep. 121.

To the extent that it may thus be used to nullify acts partially completed, it is a remedial as well as a preventive writ. But it belongs, notwithstanding, to the preventive, and not to the remedial class of writs.[1] It can not be used to try the title to an office.[2]

The writ is applicable to a case where a lower court has been possessed of jurisdiction, but has been deprived thereof by some step taken in the case; for example, by an application for removal to a federal court,[3] or has lost jurisdiction by a failure to act in time,[4] or by an appeal,[5] or by other means.

As the writ can only issue to inferior courts or tribunals, the power to issue it belongs to superior courts. And the writ can only issue from a court of superior jurisdiction to the one to whom it is issued.[6] But some of the statutes on the subject provide, specifically, by what courts the writ may be issued.

The power to issue the writ exists in the supreme court of the United States when necessary for the exercise of its appellate jurisdiction, as in case of other appellate courts. And, by express statutory provision, it is given power to issue the writ to the district courts when proceeding as courts of admiralty and maritime jurisdiction.[7] But it has no general power to issue such writ.[8]

And it has been held that where an appeal lies to the supreme court of the United States from the circuit court, the former has no jurisdiction to issue a writ of prohibi-

[1] Havemeyer *v.* Superior Court, 84 Cal. 327, 394; 24 Pac. Rep. 121; Thomson *v.* Tracy, 60 N. Y. 31, 38.

[2] State *v.* McMartin, 42 Minn. 30; 43 N. W. Rep. 572; In re Radl, 57 N. W. Rep. 1105.

[3] Sheehy *v.* Holmes, 55 Cal. 485; Hayne *v.* Justices Court, 82 Cal. 284; 23 Pac. Rep. 125.

[4] State *v.* Williams, 48 Ark. 227; 2 S. W. Rep. 843; State *v.* Walls, 113 Mo. 42; 20 S. W. Rep. 883; Burroughs *v.* Taylor, 17 S. E. Rep. 745.

[5] State *v.* Superior Court, 6 Wash. St. 112; 32 Pac. Rep. 1072.

[6] High Ext. Leg. Rem., sec. 785.

[7] Rev. Stat. U. S. 688; Ex parte Easton, 95 U. S. 68; United States *v.* Peters, 3 Dall. 121.

[8] Ex parte Easton, 95 U. S. 68, 72; Ex parte City Bank of New Orleans, 3 How. 292; Bryan *v.* United States, 1 Black, 140.

tion to prevent action in a cause by the latter until an appeal is actually taken.[1]

The circuit and district courts of the United States have jurisdiction to issue the writ when necessary for the exercise of their respective jurisdictions, but not otherwise.[2]

The writ is an extraordinary one in the sense that it can only issue where there is no other plain, speedy and adequate remedy in the ordinary course of law.[3]

It is not sufficient to deprive a party of the writ that he may resort to another remedy. It must be a speedy and an adequate remedy.[4]

It is usually denominated a prerogative writ;[5] but is, in fact, and is treated in practice at the present time, very generally as a writ of right which a court has no legal right to refuse upon a proper showing, although it is generally held to rest in the sound legal discretion of the court whether it shall issue or not;[6] which means nothing less than that it is a writ of right, plain and simple, and that if a court refuses to issue it upon a proper showing, such refusal is error for which the applicant is entitled to a reversal, on appeal to a higher court, where the remedy by appeal is open to him.

But in some of the states it is expressly held that the writ is not demandable as matter of right, but of sound legal discretion, and that therefore the action of the court denying the writ is not reviewable on appeal.[7] The better rule, however, is the other way.[8]

The writ is purely jurisdictional and will not lie to cor-

[1] Ex parte Warmouth, 17 Wall. 64.

[2] Rev. Stat. U. S., sec. 716; High Ext. Leg. Rem., sec. 786.

[3] State *v.* Braun, 31 Wis. 600; State *v.* Superior Court, 2 Wash. St. 9; 25 Pac. Rep. 1007; McConiha *v.* Guthrie, 21 W. Va. 134, 141; Murphy *v.* Superior Court, 84 Cal. 592; 24 Pac. Rep. 310; Willman *v.* District Court, 35 Pac. Rep. 692.

[4] Havemeyer *v.* Superior Court, 84 Cal. 327, 397; 24 Pac. Rep. 121.

[5] High Ext. Legal Rem., sec. 765.

[6] Havemeyer *v.* Superior Court, 84 Cal. 327, 401, 403; 24 Pac. Rep. 121; Smith *v.* Whitney, 116 U. S. 167; 6 Sup. Ct. Rep. 570; County Court *v.* Boreman, 12 S. E. Rep. 490; 34 W. Va. 362.

[7] People *v.* Westbrook, 89 N. Y. 152.

[8] Smith *v.* Whitney, 116 U. S. 167; 6 Sup. Ct. Rep. 570.

rect errors or be allowed to usurp the functions of a writ of error or *certiorari*, or of the remedy by appeal.[1] And where the party has his remedy by writ of error, appeal, or *certiorari*, and the circumstances are such that either of said remedies will be efficient and adequate, the writ will be denied.[2]

But the mere fact that such other remedies, or either of them, are available, is not, necessarily, a bar to the remedy of prohibition. Whether the writ shall issue, notwithstanding the existence of such other remedies, is within the discretion of the court,[3] although it is held otherwise in some of the cases.[4]

A distinction is made, in this respect, in some of the cases, between an entire want of jurisdiction of the general subject-matter and a mere excess of jurisdiction;[5] but the distinction does not seem to rest upon any solid foundation in reason. The remedy by appeal or *certiorari* would seem to be as speedy and adequate in one case as in the other. It is held that this limitation upon the right to the writ does not apply to an application to prevent the exercise of jurisdiction in extraordinary proceedings.[6]

If it appears that because of delay in the enforcement of such other remedies, or for any other reason, they will not be efficient and adequate, the writ should issue.[7] The mere fact, however, that a resort to other remedies will

[1] High Ext. Leg. Rem., sec. 772; City of Coronado *v.* City of San Diego, 97 Cal. 440; 32 Pac. Rep. 518; Coker *v.* Superior Court, 58 Cal. 177; Day *v.* Superior Court, 61 Cal. 489; Bishop *v.* Superior Court, 87 Cal. 226; 25 Pac. Rep. 435; People *v.* Nichols, 79 N. Y. 582, 591; Turner *v.* Mayor, 78 Ga. 683; 3 S. E. Rep. 649.

[2] Coker *v.* Superior Court, 58 Cal. 177; Agassiz *v.* Superior Court, 90 Cal. 101; 27 Pac. Rep. 49; Turner *v.* Mayor, 78 Ga. 683; 3 S. E. Rep. 649; Willman *v.* District Court, 35 Pac. Rep. 692.

[3] Yearian *v.* Speirs, 4 Utah, 385; 10 Pac. Rep. 609, 616: State *v.* Wilcox, 24 Minn. 143, 147.

[4] People *v.* Hills, 5 Utah, 410; 16 Pac. Rep. 405.

[5] Yearian *v.* Speirs, 4 Utah, 385; 10 Pac. Rep. 609, 616.

[6] State *v.* Wilcox, 24 Minn. 143, 147.

[7] Havemeyer *v.* Superior Court, 84 Cal. 327, 397; 24 Pac. Rep. 121; Ducheneau *v.* House, 4 Utah, 369; 10 Pac. Rep. 838; Hayne *v.* Justices Court, 82 Cal. 284; 23 Pac. Rep. 125.

cause longer delay than by enforcing a writ of prohibition, or will cause the party greater inconvenience, will not authorize the issuance of the writ unless it also appears that such delay will cause injury to the applicant or in some way render the remedy, in the particular case, inefficient and inadequate.[1]

It is generally held that the writ will not issue where the applicant therefor has his remedy by *certiorari*.[2] But, in some of the cases, decided under statutes authorizing the issuance of the writ where there is no plain, speedy and adequate remedy in the ordinary course of law, it is held that the right to resort to *certiorari* as a remedy will not bar the right to prohibition because the proceeding by *certiorari* is not in the ordinary course of law, although it may be speedy and adequate.[3]

And the rule thus laid down is to be commended. There is no good reason why a party should be denied one remedy because he has another remedy equally summary in its nature, and equally beyond and outside of the ordinary course of law. Such arbitrary rules by which parties are denied relief or delayed in their efforts to obtain it, have nothing to commend them.

It is generally held that the writ can not issue until the question of jurisdiction in the inferior court has been presented to that court, by a plea to the jurisdiction, or in some other appropriate way, and decided against the applicant or a decision refused.[4] But the failure to raise the question in such inferior court is not an absolute bar to the right to prohibition and the superior court may, in its discretion, grant

[1] Agassiz *v.* Superior Court, 90 Cal. 101; 27 Pac. Rep. 49; Strouse *v.* Police Court, 85 Cal. 49; 24 Pac. Rep. 747; Willman *v.* District Court, 35 Pac. Rep. 692.

[2] Turner *v.* Mayor, 78 Ga. 683; 3 S. E. Rep. 649; County Court *v.* Boreman, 34 W. Va. 362; 12 S. E. Rep. 490; State *v.* Bowerman, 40 Mo. App. 576.

[3] Ducheneau *v.* House, 4 Utah, 369; 10 Pac. Rep. 838.

[4] State *v.* Superior Court, 2 Wash. St. 9; 25 Pac. Rep. 1007; State *v.* Williams, 48 Ark. 227; 2 S. W. Rep. 843; Walcott *v.* Wells, 21 Nev. 47; 24 Pac. Rep. 367; Baughman *v.* Superior Court, 72 Cal. 572; 14 Pac. Rep. 207; State *v.* Henry, 41 La. Ann. 908; 6 Sou. Rep. 807.

the writ, where objection to its jurisdition has not been presented to the lower court.[1] And in some of the cases the requirement that the want of jurisdiction must be pleaded in the court below, is held to apply only where the want of jurisdiction does not appear on the face of the record, and that when it does so appear, it is unnecessary which was the common law rule on the subject.[2]

Prohibition will lie to prevent action where the court has not jurisdiction of the person as well as in cases where there is an absence of jurisdiction of the subject-matter. But where the court has jurisdiction of the subject-matter and the question of its jurisdiction of the person, or of the particular case, or of some branch of or proceeding in the case, turns upon some fact to be determined by the court, its decision that it has jurisdiction, if wrong, is an error, for which an appeal or other similar remedy is appropriate, and prohibition is not the proper remedy.[3]

It is frequently very difficult to distinguish, in this class of cases, between error in determining the question of jurisdiction which can not be reached by prohibition, and a want or excess of jurisdiction which will authorize the inforcement of the writ, and no definite rule on the subject can be laid down. But it is quite clear that where the power to act with respect to the particular cause or matter in controvery is entirely wanting, and no discretion rests in the inferior tribunal with reference to the question whether it shall act or not, the writ is the proper remedy.

On the other hand, if the question is one of discretion in the lower court, or the question whether it has power

[1] Havemeyer *v.* Superior Court, 84 Cal. 327, 403; 24 Pac. Rep. 121; Swinburn *v.* Smith, 15 W. Va. 483, 498; State *v.* Wilcox, 24 Minn. 143.

[2] Swinburn *v.* Smith, 15 W. Va. 383, 498; Arnold *v.* Shields, 5 Dana (Ky.) 18; 30 Am. Dec. 669.

[3] Mines D'Or, etc., Soc. *v.* Superior Court, 91 Cal. 101; 27 Pac. Rep. 532; Agassiz *v.* Superior Court, 90 Cal. 101; 27 Pac. Rep. 49; McConiha *v.* Guthrie, 21 W. Va. 134, 141; Bruner *v.* Superior Court, 92 Cal. 239, 251; 28 Pac. Rep. 341; Walcott *v.* Wells, 21 Nev. 47; 24 Pac. Rep. 367; Mastin *v.* Sloan, 98 Mo. 252; 11 S. W. Rep. 558; State *v.* Valliant, 100 Mo. 59; 13 S. W. Rep. 398; State *v.* Kansas City Court of Appeal, 104 Mo. 419; 16 S. W. Rep. 415.

to proceed or not depends upon some fact to be determined by it, and the determination of that question in one way or the other will vest it with jurisdiction, and it has decided the question of fact in that way, the writ will not lie. In such case the court has power to determine for itself whether it has jurisdiction or not, and if it decides that it has, its decision is an error which can only be reviewed on appeal or some appropriate means for the correction of errors.[1]

It is said that the question whether the court has jurisdiction of the *particular* case or not will not be inquired into where it appears that it had jurisdiction of the gen-

[1] "Prohibition lies in all cases where there have been proceedings 'without or in excess' of jurisdiction, and there 'is not a plain, speedy, and adequate remedy in the ordinary course of law.' (Code Civ. Proc., secs. 1102, 1103.) If the views herein before expressed are correct, it is clear that the appointment of the so-called elisor was 'without jurisdiction.' Jurisdiction is usually defined as 'the power to hear and determine;' but, of course, it is difficult to express in abstract terms a statement of the distinction between error in exercising jurisdiction and jurisdiction itself, that can be readily applied to all cases as they may arise. The law endeavors to fix definitely every thing that can in its nature be so fixed, so as to leave as little as possible to the judgment or caprice of those who administer it. But as many future events can not, in the nature of things, be foreseen and provided for, it follows necessarily that much must be left to the discretion of courts and other tribunals. And the main test of jurisdiction in any particular matter is, whether or not discretion is given the court as to such matter. In the matter before us, for instance, if the law intended to give the power to appoint an elisor in the event of disqualification of the sheriff, it is apparent that the law could not determine beforehand the disqualification of any particular person who might happen to be sheriff at any future time. It could not say that any such sheriff would be actuated by 'bias or prejudice.' Consequently, the determination of the issue, when properly made, of such disqualification, is necessarily left to the discretion of the court, and it has jurisdiction to hear and determine that issue. But when there is no such disqualification, then there is no discretion given to determine whether an elisor should or should not be appointed. Consequently, when there is such an issue made, and the court finds *against* the disqualification, or when, as in the case at bar, it is admitted that there was no such disqualification, then no jurisdiction exists to make the 'appointment.'" Bruner *v.* Superior Court, 92 Cal. 239, 251; 28 Pac. Rep. 341.

eral subject-matter.[1] But this is putting the doctrine rather too strongly. Such a rule would prevent the application of the writ in any case where the question is as to jurisdiction of the person only. But where the question of jurisdiction turns upon the sufficiency or insufficiency of the service of process, and the court below has held it to be sufficient, the fact that a superior court may be of a different opinion will not authorize the issuance of the writ. A different rule must prevail, however, where there is an entire want of service, or where such service could in no case give the court jurisdiction.

Where the right to a change of venue is given by statute, if the action is brought in the wrong county, such remedy is a speedy and adequate one and must be resorted to.[2] A different rule prevails in some of the states.[3] And if an application for a change should be made and denied in a case where such application would have the effect to oust the court of jurisdiction, prohibition would be the proper remedy.[4]

But it has been held that, where there is an entire absence of jurisdiction over the person, growing out of the fact that he is sued in a personal action out of the district of his residence, the writ will not lie, the reason given being that the court has jurisdiction of the cause, and he has his remedy by appeal or *certiorari*.[5]

It is otherwise where the action is local and the subject-matter of the suit is not within the territorial jurisdiction of the court.[6] And where a party is brought into the jurisdiction as a witness and service is made upon him away

[1] Ex parte Ellyson, 20 Gratt. 24; McConiha *v.* Guthrie, 21 W. Va. 134, 141.

[2] Fresno Nat'l Bank *v.* Superior Court, 83 Cal. 491; 24 Pac. Rep. 157.

[3] City of North Yakima *v.* Superior Court, 4 Wash. St. 655; 30 Pac. Rep. 1053; State *v.* Superior Court, 5 Wash. St. 639; 32 Pac. Rep. 553.

[4] *Ante*, secs. 24, 45, 47, 51; State *v.* Superior Court, 5 Wash. St. 518; 32 Pac. Rep. 457.

[5] People *v.* Hills, 5 Utah, 410; 16 Pac. Rep. 405; State *v.* Hocker, 14 Sou. Rep. 586.

[6] Grangers Bank *v.* Superior Court, 33 Pac. Rep. 1095; City of North Yakima *v.* Superior Court, 4 Wash. St. 655; 30 Pac. Rep. 1053.

from his place of residence, proceedings under the service may be prevented by prohibition.[1] The question turns upon the effect of bringing an action in the wrong county or state, which has been considered in other sections of this work.[2]

In those cases, or in those states where it is held that the right to be sued in a particular place is a mere privilege that may be waived, and that the commencement of the action in the wrong place must be taken advantage of by objection made in the court in which the action is pending, the writ will not lie.[3] But in those cases or in those states where the want of jurisdiction is absolute, where the action is brought in the wrong place, and no objection need be made to the court in which the action is commenced in order to secure a transfer of the action or to divest the court of jurisdiction, prohibition is the proper remedy.[4]

The power to issue writs of prohibition by appellate courts is confined, in some of the states, to cases in which appeals may be taken to such courts, and in matters affecting their appellate jurisdiction; while in others the power is not so limited, but such courts are given full original jurisdiction to issue the writ to all inferior courts in all cases.[5]

It is held in some of the states that no appeal will lie from a judgment or order refusing a writ of prohibition.[6] This is placed upon the ground that the writ is not a writ of right but issues only at the discretion of the court, and the action of the court in a matter of discretion is not reviewable. But, as has been shown above, the great weight of authority, at least of modern authority, is to

[1] People *v.* Flansburg, 26 N. Y. Supl. 329; *ante*, sec. 37.

[2] *Ante*, secs. 45, 46, 47, 49, 51. [3] State *v.* Hocker, 14 Sou. Rep. 586.

[4] Grangers Bank *v.* Superior Court, 33 Pac. Rep. 1095; Fritts *v.* Camp, 94 Cal. 393; 29 Pac. Rep. 867.

[5] State *v.* McCrea, 40 La. Ann. 20; 3 Sou. Rep. 380; Connecticut River R. R. *v.* County Commissioners, 127 Mass. 50, 57; Commonwealth *v.* Latham, 85 Va. 632; 8 S. E. Rep. 488; State *v.* Henry, 41 La. Ann. 908; 6 Sou. Rep. 807.

[6] State *v.* Bowerman, 40 Mo. App. 576.

the effect that it is a writ of right and does not rest wholly within the discretion of the court. It follows that the action of a court refusing the writ may be reviewed on appeal, and so it is generally held.[1]

The question whether an order to show cause why a writ of prohibition shall not issue may be made by a judge at chambers or in vacation, in the absence of some statute authorizing it, is open to serious question, although the right has been upheld in some of the cases.[2]

And whatever may be the correct rule as to an order to show cause the writ can only issue by a court.

Prohibition is the proper remedy to prevent action by a judge who is disqualified by interest, or otherwise.[3]

82. HABEAS CORPUS.—It is not the purpose of this section to enter into a history of the writ of *habeas corpus* or of the causes for its issuance further than may be found to be necessary in an effort to ascertain the extent of and limitations upon the jurisdiction of the courts in issuing the writ, the extent to which they may go in the investigation of the

[1] "It is often said that the granting or refusing of a writ of prohibition is discretionary, and, therefore, not the subject of a writ of error. That may be true where there is another legal remedy by appeal or otherwise, or where the question of the jurisdiction of the court whose action is sought to be prohibited is doubtful, or depends on facts which are not made matter of record, or where a stranger, as he may in England, applies for the writ of prohibition. But where that court has clearly no jurisdiction of the suit or prosecution instituted before it, and the defendant therein has objected to its jurisdiction at the outset, and has no other remedy, he is entitled to a writ of prohibition as matter of right; and a refusal to grant it, where all the proceedings appear of record, may be reviewed on error. This is the clear result of the modern English decisions, in which the law concerning writs of prohibition has been more fully discussed and explained than in the older authorities. In re Forster, 4 Best & S. 187, 199; Mayor, etc., of London *v.* Cox, L. R. 2 H. L. 239, 280; Worthington *v.* Jeffries, L. R. 10 C. P. 379, 380; Chambers *v.* Green, L. R. 20 Eq. 552, 555. See, also, Weston *v.* City Council of Charleston, 2 Pet. 449, reversing on error s. c., Harp. 340." Smith *v.* Whitney, 116 U. S. 167; 6 Sup. Ct. Rep. 570, 573.

[2] State *v.* Rombauer, 104 Mo. 619; 15 S. W. Rep. 850; 16 S. W. Rep. 502.

[3] *Ante*, sec. 62; North Bloomfield Mining Co. *v.* Keyser, 58 Cal. 315; Heilbron *v.* Campbell, 23 Pac. Rep. 122.

jurisdiction and acts of other courts, and the extent and character of the relief that may be afforded under the writ. For this purpose it is sufficient to say that it is a writ the object of which is to liberate those who are unlawfully imprisoned,[1] whether by the action or under the order or judgment of a court, or without the forms of law.

The right to the writ exists independently of and can not be taken away by statute.[2] The right is guaranteed by the constitution of the United States and of the states,[3] and the power to issue it is given, very generally, to all of the superior courts, state and national, and the judges thereof, from the courts of final appellate jurisdiction down.[4] But the power is sometimes given to the court alone and not to the judges.[5] And, generally, the power given to the appellate courts is vested in them as original and not as appellate jurisdiction alone.

Generally, an appeal is also given from the subordinate to the higher courts in the exercise of the jurisdiction to issue the writ,[6] but not always.[7] And where no appeal is allowed by statute *certiorari* may be resorted to.[8]

In some of the states the doctrine that there can be no appeal in this class of cases is placed upon the ground that the jurisdiction of all of the courts and judges to issue the writ is original and concurrent, and none can review the action of another.[9]

The causes for which the writ may issue are not, generally, provided by statute, except where the office of the

[1] Ex parte Watkins, 3 Pet. 193, 202.

[2] People *v.* Liscomb, 60 N. Y. 559; 19 Am. Rep. 211.

[3] Hurd *Habeas Corpus*, 105.

[4] Ex parte Yerger, 8 Wall. 85; Ex parte Bollman, 4 Cranch, 75; People *v.* Liscomb, 60 N. Y. 559; 19 Am. Rep. 211; Ex parte Burrus, 136 U. S. 586; 10 Sup. Ct. Rep. 850; Patterson *v.* State, 50 N. J. L. 421; 14 Atl. Rep. 125.

[5] In re White, 33 Neb. 812; 51 N. W. Rep. 287.

[6] Speer *v.* Davis, 38 Ind. 271; Ex parte Trader, 24 Tex. App. 393; 6 S. W. Rep. 533.

[7] Ex parte Jilz, 64 Mo. 205; 27 Am. Rep. 218; Ferguson *v.* Ferguson, 5 Mo. 197; In re Strickland, 41 La. Ann. 324; 6 Sou. Rep. 577.

[8] State *v.* Herndon, 107 N. Car. 934; 12 S. E. Rep. 268.

[9] In re Strickland, 41 La. Ann. 324; 6 Sou. Rep. 577.

writ is intended to be extended or enlarged.[1] Therefore, the general principles upon which it was issued in England before our constitutions and statutes were enacted will control the courts in the exercise of their jurisdiction, subject to the limitations, if any, imposed by our laws.[2]

The causes for which the writ may issue have been increased, and the extent to which the courts may go in investigating such causes have been extended and enlarged quite materially in some of the states.[3] But in none has the writ been made less effective or the causes for which it may issue been diminished.[4]

The general rule is that the writ is jurisdictional, when directed to a court or judicial officer, and can only be used to inquire into the jurisdiction of such court or officer,[5] and that it can not be used as a writ of error or appeal for the purpose of inquiring into mere errors or irregularities;[6] nor can the court determine, under the writ, whether the acts alleged constituted the offense charged or not,[7] or the sufficiency or insufficiency of the evidence to warrant the imprisonment of the party seeking the writ.[8]

But the inquiry is not confined to the question whether the court had jurisdiction of the cause and of the defend-

[1] Ex parte Watkins, 3 Pet. 193, 201; Cooley Const. Lim. *p. 347.

[2] Ex parte Parks, 93 U. S. 18; Cooley Const. Lim. *p. 347.

[3] People *v.* Liscomb, 60 N. Y. 559; 19 Am. Rep. 211; Ex parte Maxwell, 11 Nev. 428.

[4] Cooley Const. Lim. *p. 347.

[5] Ex parte Watkins, 3 Pet. 193; Ex parte Parks, 93 U. S. 18; In re Eldred, 46 Wis. 530; 1 N. W. Rep. 175; Ex parte Siebold, 100 U. S. 371; In re Terry, 128 U. S. 289; 9 Sup. Ct. Rep. 77; Wright *v.* Wright, 74 Wis. 439; 43 N. W. Rep. 145; Commonwealth *v.* Lecky, 1 Watts, 66; 26 Am. Dec. 37, 41, 42; Cooley Const. Lim. *pp. 347, 348.

[6] Ex parte Watkins, 3 Pet. 193; Ex parte Parks, 93 U. S. 18; Ex parte Siebold, 100 U. S. 371; Ex parte Fisher, 6 Neb. 309; Phillips *v.* Welch, 12 Nev. 158; Ex parte Winston, 9 Nev. 71; Ex parte Maxwell, 11 Nev. 428; Turney *v.* Barr, 75 Ia. 758; 38 N. W. Rep. 550; Commonwealth *v.* Lecky, 1 Watts. 66; 26 Am. Dec. 37, 40, 41; Cooley Const. Lim. *pp. 347, 348.

[7] Horner *v.* United States, 143 U. S. 570; 12 Sup. Ct. Rep. 522.

[8] Horner *v.* United States, 143 U. S. 570; 12 Sup. Ct. Rep. 407; Orteiza *v.* Jacobus, 136 U. S. 330; 10 Sup. Ct. Rep. 1031; Ex parte Marx, 86 W. Va. 40; 9 S. E. Rep. 475; In re Haskell, 52 Fed. Rep. 795.

ant, but may be extended to the question whether the court had power to render a particular judgment or impose the particular penalty inflicted.[1]

A different rule is laid down under some of the statutes, it being held that the court has no power to go behind the judgment of a court of general jurisdiction to inquire whether the judgment is valid or not.[2] But the construction thus placed upon the statute, which is similar to statutes on the same subject in other states, restricts the powers of the courts, under the writ, beyond all reason. The inhibition against an inquiry into the legality of a final judgment of a "court of competent jurisdiction" can not reasonably be construed to prevent all inquiry into the question whether the court rendering the judgment, although one of general jurisdiction, was competent to render the judgment brought in question. And it is not sufficient to bar the right that the court had jurisdiction of the general subject-matter. It must have jurisdiction to render judgment in the particular case.[3] So if the court is one of special jurisdiction the question whether it has kept within the powers conferred upon it may be inquired into by *habeas corpus*.[4] But whether the imposition of a sentence in excess of what the law permits is ground for the writ is a question about which there is a great diversity of opinion in the decided cases. In some it is held that the imposition of such a sentence is not merely an error of law but is an excess of jurisdiction from which the party is entitled to be relieved by *habeas corpus*.[5]

In others the direct contrary is held on the ground that as the court has jurisdiction of the offense and of the person of the defendant the imposition of a wrong sentence

[1] People *v.* Liscomb, 60 N. Y. 559; 19 Am. Rep. 211; In re Pierce, 44 Wis. 411; In re Smith, 33 Pac. Rep. 957; In re Bonner, 14 Sup. Ct. Rep. 323.

[2] In re Lybarger, 2 Wash. St. 131; 25 Pac. Rep. 1075.

[3] State *v.* Kinmore, 55 N. W. Rep. 830.

[4] In re O'Sullivan, 31 Fed. Rep. 447.

[5] Ex parte Snow, 120 U. S. 274; 7 Sup. Ct. Rep. 556; Ex parte Brown, 97 Cal. 83; 31 Pac. Rep. 840; In re Blair, 4 Wis. 522; Ex parte Page, 49 Mo. 291; Ex parte Bernert, 62 Cal. 524.

is no more than an error committed by a court having jurisdiction, and therefore can not be reviewed under the writ;[1] while in others it is held that the court, having jurisdiction of the offense and of the person of the defendant, its sentence is valid, so far as it is within the law, and wholly void so far as it is in excess of it; and that the defendant may, by *habeas corpus*, be relieved from such excess, but is bound by so much of the sentence as is within the law where the two can be separated.[2] And where a court is authorized to require the payment of certain items of costs, as a part of the penalty, to include certain items not properly chargeable against the defendant is an error not reviewable under the writ.[3]

It is impossible to extract any rule on the subject from the authorities. But it is believed to be the better rule that the imposition of a sentence not authorized by law, as respects the kind and not the extent, of such punishment, whether the same is the only punishment inflicted, or is one imposed in addition to one authorized by law, is an excess of jurisdiction, for which *habeas corpus* is the proper remedy. But if the kind of sentence imposed is authorized by law and the error consists in making such a sentence larger or smaller than the law allows, it should be treated as an error merely, which must be corrected by appeal or writ of error and not by *habeas corpus*.[4] But in such a case the court may, in its discretion, allow the writ.[5] In the one case the sentence would be void;[6] in

[1] Sennott *v.* Swan, 146 Mass. 489; 16 N. E. Rep. 448; Ex parte Shaw, 7 Ohio St. 81; 70 Am. Dec. 55; Ex parte Van Hagan, 25 Ohio St. 426, 432; Ex parte Crandall, 34 Wis. 177.

[2] People *v.* Liscomb, 60 N. Y. 559; 19 Am. Rep. 211; People *v.* Jacobs, 66 N. Y. 8; People *v.* Baker, 89 N. Y. 460, 467; Marx *v.* Milstead, 9 S. E. Rep. 617; Ex parte Bulger, 60 Cal. 438.

[3] People *v.* Jacobs, 66 N. Y. 8.

[4] State *v.* Sloan, 65 Wis. 647; 27 N. W. Rep. 616; In re Graham, 74 Wis. 450; 43 N. W. Rep. 148; Ex parte Crandall, 34 Wis. 177; Ross's Case, 2 Pick. 165.

[5] Feeley's Case, 12 Cush. 598.

[6] Ex parte Town of Russellville, 11 Sou. Rep. 18.

the other it would be voidable only or erroneous. And this should be the test of the right to the writ.[1]

It is not ground for the writ that the sentence imposed is not warranted by the verdict of the jury, if it is one that might lawfully be pronounced under any circumstances for the offense alleged in the indictment.[2] If the sentence is void for uncertainty, this is sufficient ground for the writ.[3] If the commitment is for an imprisonment not authorized by law, this is held to be good cause for discharging the prisoner under the writ.[4]

There is no jurisdiction to inquire into the sufficiency of the indictment in matters of specific allegation, which might be insufficient on demurrer, if it describes an offense belonging to a general class of offenses within the jurisdiction of the court, and alleges the defendant to be guilty of such offense. But if the indictment does not charge an act that, if sufficiently alleged, would be within the jurisdiction of the court, or charges an offense which is not a violation of law at all, the accused is entitled to the writ.[5] So if there is no indictment at all where one is required, or the indictment returned has been amended, which is the same thing, the defendant is entitled to be discharged.[6]

The question as to the extent to which courts may go, under the writ of *habeas corpus*, in investigating the sufficiency of the grounds upon which a prisoner is held in custody, often arises in cases of the surrender of fugitives from justice by one state to another, under the act of con-

[1] State *v.* McClay, 54 N. W. Rep. 524; Ex parte Roberts, 9 Nev. 44; 16 Am. Rep. 1; Commonwealth *v.* Lecky, 1 Watts, 66; 26 Am. Dec. 37, 41, note; Ex parte Parks, 93 U. S. 18; Ex parte Shaw, 7 Ohio St. 81; 70 Am. Dec. 55.

[2] State *v.* Sloan, 65 Wis. 647; 27 N. W. Rep. 616; Ex parte Max, 44 Cal. 579.

[3] Ex parte Roberts, 9 Nev. 44.

[4] Marx *v.* Milstead, 9 S. E. Rep. 617.

[5] Ex parte Coy, 127 U. S. 731; 8 Sup. Ct. Rep. 1263; In re Greenough 31 Vt. 279; Ex parte Semler, 41 Wis. 517, 523; In re Kowalsky, 73 Cal. 120; 14 Pac. Rep. 399; Ex parte Mirande, 73 Cal. 365; 14 Pac. Rep. 888.

[6] Ex parte Bain, 121 U. S. 1; 7 Sup. Ct. Rep. 781.

gress. The general rules are essentially the same in this class of cases as in cases of detention under direct process of the courts. The qestion as to the power and authority of the governor of a state to authorize the arrest and return of the party accused is one of jurisdiction, and the question of the sufficiency of the warrant is confined to matters affecting its validity and does not extend to mere defects or irregularities in the warrant or other proceedings. In other words, if the warrant is void the writ will lie, if voidable only, it will not.[1] But the court may determine, under the writ, whether the petitioner has been charged with a crime in the state from which he is alleged to have fled.[2]

The governor upon whom the requisition is made must also determine whether or not the accused is a fugitive from justice. This is a question of fact, and under the general rules above laid down could not be inquired into under a writ of *habeas corpus*. The finding of the governor should be held to be conclusive. But some doubt has been thrown upon this question by the decisions of the supreme court of the United States, in which the question whether the finding of the governor is conclusive or only *prima facie* evidence of the fact is left an open one.[3] And it has been held that his finding is not conclusive but may be reviewed by the courts.[4]

As to the question whether or not a crime is charged, the inquiry does not extend to mere defects or irregularities in the affidavit or indictment accompanying the requisition,[5] nor to a determination of its sufficiency.[6] But in case of a removal from one federal district to another, the court may inquire whether an offense against the United

[1] In re Greenough, 31 Vt. 279, 285; Ex parte Spears, 88 Cal. 640; 26 Pac. Rep. 608.

[2] Roberts *v.* Reilly, 116 U. S. 95; 6 Sup. Ct. Rep. 291; Ex parte Spears, 88 Cal. 640; 26 Pac. Rep. 608.

[3] Ex parte Reggels, 114 U. S. 642; 5 Sup. Ct. Rep. 1148; Roberts *v.* Reilly, 116 U. S. 95; 6 Sup. Ct. Rep. 291.

[4] In re Cook, 49 Fed. Rep. 833, 838; Wilcox *v.* Nolze, 34 Ohio St. 520.

[5] Ex parte Spears, 88 Cal. 640; 26 Pac Rep. 608.

[6] Pearce *v.* State, 23 S. W. Rep. 15.

States, and within the jurisdiction of the court in which the indictment is pending, is charged.[1] The rules are the same, substantially, in proceedings for the extradition of persons at the instance of foreign countries.[2] The federal courts have jurisdiction in such cases.[3] If one extradited for one offense is indicted and is held in custody for another and different offense, he may be released by *habeas corpus*.[4] A court may inquire into the legality of an imprisonment by a legislative body or of a body claiming to be such.[5]

There are exceptions to the rule that the writ will not lie to test the sufficiency of the evidence. For example, the writ may be used to inquire into the question whether there is probable cause for the detention of a prisoner upon a non-bailable offense with a view to admit him to bail, or discharge him.[6] So in some of the states the writ may be used to inquire whether, in case of the commitment of the prisoner for trial, the evidence is such that he should be held, and if not to discharge him from imprisonment,[7] both of which involve an examination of and decision upon the evidence.[8] In this class of cases the decision of the court below, as to the sufficiency of the evidence, will not be reviewed on appeal.[9]

The general rule is that if the petitioner is held under

[1] In re Greene, 52 Fed Rep. 104; In re Terrell, 51 Fed. Rep. 213.

[2] Oteiza *v.* Jacobus, 136 U. S. 330; 10 Sup. Ct. Rep. 1031; Stevens *v.* Fuller, 136 U. S. 468; 10 Sup. Ct. Rep. 911; In re Adutt, 55 Fed. Rep. 376.

[3] In re Fitton, 45 Fed. Rep. 471.

[4] In re Fitton, 45 Fed. Rep. 471; Ex parte McKnight, 48 Ohio St. 588; 28 N. E. Rep. 1034.

[5] In re Gunn, 50 Kan. 155; 32 Pac. Rep. 470.

[6] State *v.* Herndon, 107 N. Car. 934; 12 S. E. Rep. 268; Benjamin *v.* State, 25 Fla. 675; 6 Sou. Rep. 433; Commonwealth *v.* Lecky, 1 Watts 66; 26 Am. Dec. 37, 40 note; Cooley Const. Lim., *p. 348; In re Secrest, 14 Pac. Rep. 144.

[7] State *v.* Holm, 37 Minn. 405; 34 N. W. Rep. 748; Ex parte Sternes, 82 Cal. 245; 23 Pac. Rep. 38.

[8] Ex parte Bollman, 4 Cranch, 75.

[9] State *v.* Herndon, 107 N. Car. 936; 12 S. E. Rep. 268.

a judgment of a competent court, the sufficiency of the judgment or commitment will not be inquired into.[1]

It is held that the question whether the law under which the court is acting or the petitioner held in custody is constitutional or not may be determined under the writ.[2] But this is a matter about which there is considerable question and about which the authorities are not agreed. Of course, if the question is as to the constitutionality of the law under which the court claims to exist, or as to its jurisdiction to act, the power to determine the question properly arises under the writ, because to determine that question is to determine whether there was a court, or, if there was, whether it had, by virtue of the statute in question, jurisdiction to act. In other words, the question would be, not as to the validity of the acts of a competent court, but whether there was such a court.[3]

But if the constitutionality of the statute affects only the question of the guilt or innocence of the accused and not the question of the jurisdiction of the court, it would at first glance seem to be equally clear that the question could not be determined under the writ because the question as to the existence or constitutionality of the statute is one for the court to determine and its ruling thereon, if wrong, is an error only, which can not, under the well settled rule, be reviewed by the writ of *habeas corpus*.[4]

But still it may well be said that the commitment without authority of law resulting from the repeal of a statute

[1] Ex parte Kearney, 7 Wheat. 38; Ex parte Winston, 9 Nev. 71; In re Donohue, 52 How. Pr. 251.

[2] Ex parte Siebold, 100 U. S. 371; Sennott *v.* Swan, 146 Mass. 489; 16 N. E. Rep. 448; Ex parte Kieffer, 40 Fed. Rep. 399; In re Kemmler, 7 N. Y. Supl. 145; Ex parte Keeney, 84 Cal. 304; 24 Pac. Rep. 34; Ex parte Rosenblatt, 19 Nev. 439; 14 Pac. Rep. 298; In re Ah Jow, 29 Fed. Rep. 181; United States *v.* Patterson, 29 Fed. Rep. 775; Ex parte Westerfield, 55 Cal. 550; 36 Am. Rep. 47.

[3] In re Donohue, 52 How. Pr. 251.

[4] Ex parte Winston, 9 Nev. 71; Ex parte Watkins, 3 Pet. 193; Ex parte Harris, 47 Mo. 164; Ex parte Boeninghausen, 91 Mo. 301; 1 S. W. Rep. 761; In re French, 81 Wis. 597; 51 N. W. Rep. 960; In re Donohue, 52 How Pr. 251.

or because of its unconstitutionality is an excess of jurisdiction. In some of the cases, where the statute held to be unconstitutional is the one defining the offense and providing for its punishment, it is held that the proceeding under it is void, for the reason that the indictment or information fails to state a public offense.[1]

So the question is not without difficulty. But it must not be overlooked that some of the cases holding that the constitutionality of the statute can not be inquired into are founded upon statutes authorizing the issuing of the writ for specific causes, not including the one under consideration.[2] Where the statute claimed to be invalid affects the sentence to be imposed and not the offense charged, it is held that the question as to its validity can not be raised by *habeas corpus*.[3]

Some of the cases go to the extent of holding that no inquiry can be made if the party is detained under the final decree or judgment of a competent court, and that no imprisonment is illegal where the process is a justification of the officer.[4]

While the cases holding that the court may inquire into the constitutionality of a statute, under the writ, are inconsistent with the general rule that mere errors are not subject to review, yet the clear weight of authority is in favor of the jurisdiction.

If the court has acted without jurisdiction or has transcended its powers, the petitioner will be discharged from imprisonment as a result of its unauthorized action, as well after as before final judgment.[5]

A judgment rendered out of the term time of the court is void and subject to review by *habeas corpus*.[6]

[1] Ex parte Keeney, 84 Cal. 304; 24 Pac. Rep. 34.

[2] Ex parte Boeninghausen, 91 Mo. 301; 1. S. W. Rep. 761.

[3] In re Pikulik, 81 Wis. 158; 51 N. W. Rep. 261; In re Schuster, 82 Wis. 610; 52 N. W. Rep. 757.

[4] Commonwealth *v.* Lecky, 1 Watts, 66; 26 Am. Dec. 37; Ex parte Winston, 9 Nev. 71.

[5] Ex parte Parks, 93 U. S. 18, 23; Ex parte Lange, 18 Wall. 163; People *v.* Liscomb, 60 N. Y. 559; 19 Am. Rep. 211.

[6] In re Juneman, 28 Tex. App. 486; 13 S. W. Rep. 783.

The general rule is that, in order to give rise to the jurisdiction, there must be an actual imprisonment at the time the writ is prayed for.[1] But the use of the writ is allowed in the state courts to determine who shall have the custody of infants, in which cases the imprisonment or detention does not usually exist.[2]

The jurisdiction under the writ is confined to the single question whether the party in custody shall be released therefrom or remanded, or what, if any, other disposition of his body shall be made, and does not extend to the determination of any property or other rights growing out of the controversy respecting his confinement or detention.[3]

The writ of *habeas corpus* is a writ of right.[4] But the right is not absolute in all cases. The courts have some discretion as to the issuance of the writ in particular cases where other remedies exist.[5] The writ is applicable to a case where one charged with crime is not speedily brought to trial. The right to a speedy trial is preserved in some of the states by statutory provisions fixing the time within which the trial shall be had. And under these statutes, or independently of them, the party held for trial may be discharged from custody if not brought to trial within the time fixed by statute, or, if no time is fixed, within a reasonable time.[6]

But as a rule the failure to bring the accused to trial within the time limited by statute does not entitle the party to his discharge, absolutely, but it may be shown that there was sufficient cause for the delay, to avoid his

[1] Spring *v.* Dahlman, 34 Neb. 692; 52 N. W. Rep. 567; Wales *v.* Whitney, 114 U. S. 564; 5 Sup. Ct. Rep. 1050.

[2] In re Barry, 42 Fed. Rep. 113.

[3] Ferguson *v.* Ferguson, 5 Mo. 197.

[4] State *v.* Langridge, 44 La. Ann. 1014; 11 Sou. Rep. 541.

[5] Ex parte Royall, 117 U. S. 241; 6 Sup. Ct. Rep. 734; United States *v.* Ronan, 33 Fed. Rep. 117; State *v.* Langridge, 44 La. Ann. 1014; 11 Sou. Rep. 541; Ex parte Kieffer, 40 Fed. Rep. 399; Ex parte Mirzan, 119 U. S. 584; 7 Sup. Ct. Rep. 341.

[6] Patterson *v.* State, 50 N. J. Law, 421; 14 Atl. Rep. 125; In re McMicken, 39 Kan. 406; 18 Pac. Rep. 473.

discharge.[1] And it has been held that under such a statute the remedy of the accused is to move for a dismissal of the prosecution, and that until it is dismissed the writ will not lie.[2]

It has been questioned whether, in case the continuance beyond the time limited was by order of the court before whom the cause was pending, the question whether there was in fact sufficient cause for the delay can be inquired into under the writ.[3] And it is quite clear that this can not properly be done. In some instances the right to apply for the writ is so limited that the application can only be made to the court or the judge thereof before whom the action resulting in the imprisonment is pending.[4]

With reference to the question of jurisdiction of the court in cases of confinement under judicial proceedings, it is usually held that the question must be determined from the record, and that the recitals in the record are conclusive.[5] But these general rules are subject to exception, and evidence *dehors* the record, or in opposition to the *mittimus* or return is sometimes allowed to establish a want of jurisdiction in the court,[6] or want of authority in the officer. And not infrequently the jurisdiction or authority, or the want or absence of either, does not appear from the record or papers, and can only be established by extraneous evidence.

The federal courts have and exercise an extensive and important jurisdiction over the writ affecting not only their own jurisdiction and powers but those of

[1] Ex parte Bull, 42 Cal. 196.

[2] Ex parte Strong, 31 Pac. Rep. 574.

[3] Patterson *v.* State, 50 N. J. Law, 421; 14 Atl. Rep. 125.

[4] People *v.* Hefferman, 38 How. Pr. 402.

[5] Ex parte Watkins, 3 Pet. 193; In re Terry, 128 U. S. 289; 9 Sup. Ct. Rep. 77; Ex parte Davis, 11 Sou. Rep. 308; Ex parte Scott, 70 Miss. 247; 11 Sou. Rep. 657; Daniels *v.* Towers, 79 Ga. 785; 7 S. E. Rep. 120; Ex parte Twohig, 13 Nev. 302.

[6] People *v.* McLeod, 25 Wend. 483, 571; 37 Am. Dec. 328; Ex parte Mayfield, 141 U. S. 107; 11 Sup. Ct. Rep. 939.

the state courts also.[1] And the power is given to the judges of the supreme court and of the circuit and district courts.[2]

The appellate jurisdiction of the supreme court of the United States, in this class of cases, extends to the state courts of last resort.[3] But the jurisdiction of the federal courts to issue the writ in case of a prisoner in jail is limited to cases where he is "in custody under or by color of the authority of the United States, or is committed for trial before some court thereof; or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof; or is in custody in violation of the constitution or of a law or treaty of the United States; or, being a subject or citizen of a foreign state and domiciled therein, is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, or order, or sanction of any foreign state, or under color thereof, the validity and effect whereof depend upon the law of nations; or unless it is necessary to bring the prisoner into court to testify."[4]

The right of appeal was given to the circuit court of the district in which the cause was heard in the following cases:

"1. In the case of any person alleged to be restrained of his liberty in violation of the constitution, or of any law or treaty of the United States.

"2. In the case of any prisoner who, being a subject or citizen of a foreign state, and domiciled therein, is committed or confined, or in custody by or under the author-

[1] Rev. Stat. U. S., sec. 751; Ex parte Bollman, 4 Cranch, 75; Ableman *v.* Booth, 21 How. 506; Ex parte Royall, 117 U. S. 241; 6 Sup. Ct. Rep. 734; Ex parte Burrus, 136 U. S. 586; 10 Sup. Ct. Rep. 850; Ex parte Watkins, 3 Pet. 193; Cooley Const. Lim., *pp. 345, 346.

[2] Rev. Stat. U. S., sec. 752; Ex parte Burrus, 136 U. S. 586; 10 Sup. Ct. Rep. 850; Cooley Const. Lim., *pp. 345, 346.

[3] Ableman *v.* Booth, 21 How. 506; Same, 11 Wis. 498, 522 note.

[4] Rev. St. U. S., sec. 753.

ity or law of the United States, or of any state, or process founded thereon, for or on account of any act done or omitted under any alleged right, title, authority, privilege, protection, or exemption, set up or claimed under the commission, order, or sanction of any foreign state or sovereignty, the validity and effect whereof depend upon the law of nations, or under color thereof."[1]

But this appellate jurisdiction from the district courts has been transferred to the circuit courts of appeals.[2]

The authority of the circuit and district courts is confined to the districts over which they have territorial jurisdiction. No express authority to issue the writ, as a part of its original jurisdiction, is conferred upon circuit courts of appeals. Formerly the right of appeal to the supreme court of the United States from the decisions of the circuit courts was confined to the cases mentioned in the last clause above.[3] But the right has since been extended to all the cases in which appeals were authorized to be taken to the circuit courts from courts and judges inferior to it.[4]

The right of appeal to the supreme court is from the circuit court, and no appeal lies from a judge of that court.[5] And it is held that the court has no jurisdiction to review the decision of a judge at chambers under a writ issued by it.[6] The jurisdiction thus given is in the circuit and district courts original and in the supreme court appellate, for the reason that under the constitution the supreme

[1] Rev. Stat. U. S., sec. 763.

[2] 26 Stat. at L. 626; 1 Supl. Rev. Stat., 2 ed., 901; United States *v.* Fowkes, 53 Fed. Rep. 13; 3 C. C. A. Rep. 394.

[3] Rev. Stat. U. S., sec. 764; Ex parte Royall, 112 U. S. 181; 5 Sup. Ct. Rep. 98; In re Neagle, 135 U. S. 1; Cunningham *v.* Neagle, 10 Sup. Ct. Rep. 658.

[4] 23 U. S. Stat. at L. 437; 1 Supl. Rev. Stat. U. S. 485; Ex parte Royall, 117 U. S. 241; 6 Sup. Ct. Rep. 734; Ex parte Burrus, 136 U. S. 586; 10 Sup. Ct. Rep. 850; In re Neagle, 135 U. S. 1; Cunningham *v.* Neagle, 10 Sup. Ct. Rep. 658.

[5] In re Palliser, 40 Fed. Rep. 575; Carpenter *v.* Fitzgerald, 121 U. S. 87; 7 Sup. Ct. Rep. 825.

[6] In re Metzger, 5 How. 176, 191.

court could not exercise the power as original jurisdiction.[1]

The effect of the construction thus placed upon the constitution and laws is to give the supreme court appellate jurisdiction over every federal judicial tribunal, however inferior it may be, so far as the acts of such courts may be reviewed by writ of *habeas corpus*.[2] And the court has the power to review the action of other federal courts by the writ of *habeas corpus* in cases over which it has no appellate jurisdiction by appeal or writ of error.[3] And on appeal from the circuit court it has jurisdiction to review every question of substance which the circuit court could decide upon the return of the writ, including the question of its own jurisdiction.[4] And for that purpose may inquire into the evidence upon which the circuit court based its decision.[5] But it is limited in its jurisdiction, where the issuance of the writ affects the proceedings of the federal tribunals in criminal cases to the single question of the power of the court to commit the prisoner or hold him in custody. It has no general power to review the judgments or proceedings of inferior courts, in criminal cases, by the use of the writ.[6] And it has no jurisdiction where the petitioner is detained under a warrant issuing from an inferior state court involving a state law or ordinance only,[7] nor has it the power, under the writ, to release one from custody under the judgment of a state court of competent jurisdiction, not illegally asserted, for mere errors or ir-

[1] Ex parte Yerger, 8 Wall. 85; Ex parte Bollman, 4 Cranch, 75; Ex parte Siebold, 100 U. S. 371, 374; Ex parte Hung Hang, 108 U. S. 552; 2 Sup. Ct. Rep. 863.

[2] Ex parte Yerger, 8 Wall. 85.

[3] Ex parte Siebold, 100 U. S. 371; Ex parte Watkins, 3 Pet. 193.

[4] Ex parte McCardle, 6 Wall. 318.

[5] In re Neagle, 135 U. S. 1; Cunningham *v.* Neagle, 10 Sup. Ct. Rep. 658.

[6] Ex parte Curtis, 106 U. S. 371; 1 Sup. Ct. Rep. 381; Ex parte Carll, 106 U. S. 521; 1 Sup. Ct. Rep. 535; Ex parte Kearney, 7 Wheat. 38; Ex parte Watkins, 3 Pet. 193; Ex parte Wilson, 114 U. S. 417; 5 Sup. Ct. Rep. 935; In re Metzger, 5 How. 176, 191.

[7] Ex parte Hung Hang, 108 U. S. 552; 2 Sup. Ct. Rep. 863.

regularities, or upon the ground that the prisoner is innocent, or any other grounds going to the merits and not to the question of jurisdiction, although his defense to the action grows out of a law of the United States.[1]

The jurisdiction of the supreme court is not wholly appellate. It is given original jurisdiction in certain cases mentioned in the statute.[2] And in such cases it may issue writs of *habeas corpus* as a part of its original jurisdiction, and in those cases only.[3] But it is held that the supreme court has no jurisdiction of a petition by a private individual to obtain the custody of his child, claimed to be unlawfully in the custody of another private individual.[4]

And the same is true of the other federal courts. Their jurisdiction is limited to cases where the detention of the party is in violation of the constitution, laws or treaties of the United States, or where the question as to the legality of the custody arises under the constitution, laws, or treaties of the United States, or is dependent upon them, which is not true of detentions of such a character.[5]

The federal courts have no common law jurisdiction. And in respect of their jurisdiction in *habeas corpus* proceedings, as in all other cases, their jurisdiction is measured by the written law.[6] Special provisions are made for the issuance of the writ by the federal courts in certain cases.[7] And power to issue the writ is given to the supreme and district courts of the territories, and the judges thereof, with certain exceptions,[8] and writs of error and appeals from the decisions of such courts, and the judges

[1] Ex parte Crouch, 112 U. S. 178; 5 Sup. Ct. Rep. 96.

[2] Rev. Stat. U. S. sec. 687; Const. U. S. Art. 3, sec. 3.

[3] Ex parte Siebold, 100 U. S. 371; Ex parte Barry, 2 How. 65; Ex parte Hung Hang, 108 U. S. 552; 2 Sup. Ct. Rep. 863.

[4] Ex parte Barry, 2 How. 65; Ex parte Burrus, 136 U. S. 586; 10 Sup. Ct. Rep. 850.

[5] Ex parte Burrus, 136 U. S. 586; 10 Sup. Ct. Rep. 850; In re Neagle, 135 U. S. 1; Cunningham *v.* Neagle, 10 Sup. Ct. Rep. 658; In re Barry, 42 Fed. Rep. 113; In re Neagle, 39 Fed. Rep. 833; Cooley Const. Lim. *pp. 345, 346; Ex parte Ulrich, 43 Fed. Rep. 661; Ex parte Young, 50 Fed. Rep. 526.

[6] In re Barry, 42 Fed. Rep. 113.

[7] Rev. Stat. U. S. secs. 642, 643.

[8] Rev. Stat. U. S. sec. 1912.

thereof, to the supreme court of the United States, are provided for.[1]

Appeals may be taken from the district to the supreme court of the territory.[2] And the United States supreme court may acquire jurisdiction of a *habeas corpus* proceeding by certification from the circuit court upon a division of opinion on the part of the judges of said court as in other cases,[3] but not until after final judgment as the proceeding is a civil and not a criminal one.[4]

Neither the supreme court of the United States nor the supreme court of the District of Columbia, has any appellate jurisdiction over a naval court martial in proceedings for *habeas corpus*.[5] But the supreme court of the United States has, as a part of its appellate jurisdiction, the power to inquire into the authority of such courts and the validity of their acts upon a petition to it for the writ.[6] And the jurisdiction of the supreme court is general and not limited to any specific class or species of the writ.[7] But the jurisdiction of the federal courts to issue the writ in favor of one imprisoned under the process or judgment of a state court is limited to cases where the prisoner is confined in violation of some law or treaty of the United States, or is in custody for an act done or omitted in pursuance of a law of the United States, or under some other circumstances which will bring the case within some principle upon which the federal courts are authorized to interfere,[8] except to bring the party into court to testify.[9]

The authority of the federal courts to issue the writ,

[1] Rev. Stat. U. S. sec. 1909; Ex parte Snow, 120 U. S. 274; 7 Sup. Ct. Rep. 556.

[2] Rev. Stat. U. S. 1910; United States *v.* Burdick, 1 Dak. 142; 46 N. W. Rep. 571.

[3] Ex parte Milligan, 4 Wall. 2.

[4] Ex parte Tom Tong, 108 U. S. 556; 2 Sup. Ct. Rep. 871.

[5] Wales *v.* Whitney, 114 U. S. 564; 5 Sup. Ct. Rep. 1050.

[6] Ex parte Yerger, 8 Wall. 85.

[7] Ex parte Bollman, 4 Cranch 75, 93.

[8] Ex parte Dorr, 3 How. 103; In re Neagle, 39 Fed. Rep. 833; In re Shaner, 39 Fed. Rep. 869; Cooley Const. Lim., *pp. 345, 346; Ex parte Ulrich, 43 Fed. Rep. 661; Ex parte Young, 50 Fed. Rep. 526.

[9] Ex parte Dorr, 3 How. 103.

even in cases falling within their jurisdiction, is not exclusive. It may be exercised concurrently by the state courts, subject, however, to the final appellate jurisdiction of the supreme court of the United States.[1] But while a state court has undoubted jurisdiction to issue the writ, the mere fact that the petitioner is held under a process of a federal court, in a matter over which it has authority to act, may, when brought to the attention of the state court, preclude further action on its part under the writ.[2] It can not, under the proceeding for the writ, take to itself jurisdiction to determine questions involving the right of the prisoner to his discharge, over which the federal courts alone have jurisdiction.[3] But the mere fact that the petitioner is held under the process of a federal court does not oust the jurisdiction of the state court. It has the authority, in such case, as in all others, to issue the writ. Whether, however, the court can, in arriving at a conclusion, determine the constitutionality, or validity, of a law of the United States, under which the process of the federal court has issued, has been much questioned.[4]

The right of the state courts to investigate the legality of a commitment or holding in custody by a federal court or by an officer of the general government, of one of the citizens of the state as fully as the same might be done by the federal courts, involving, in some of the cases, a determination of the validity of the law under which such court has proceeded, is maintained by the decisions of some of the courts of last resort in the states.[5] But it has been denied

[1] Hurd *Habeas Corpus*, 2d ed. 154, 156; Robb *v.* Connolly, 111 U. S. 624; 4 Sup. Ct. Rep. 544.

[2] Cooley Const. Lim., *p. 347.

[3] In re Hopson, 40 Barb. 34; Cooley Const. Lim., *p. 347.

[4] Ex parte Booth, 3 Wis. 1, 157.

[5] In re Booth, 3 Wis. 157, 175; In re Tarble, 25 Wis. 390; 3 Am. Rep. 85; Commonwealth *v.* Harrison, 11 Mass. 63; Commonwealth *v.* Cushing, 11 Mass. 67; 6 Am. Dec. 156; Ex parte Collier, 6 Ohio St. 55; In re Webb, 24 How. Pr. 247; In re Beswick, 25 How. Pr. 149; Commonwealth *v.* Downes, 24 Pick. 227; in the Matter of Martin, 45 Barb. 142; People *v.* Gaul, 44 Barb. 98; McConologue's Case, 108 Mass. 154; Ex parte Roberts, 16 Ia. 600.

by other state courts,[1] and by the supreme court of the United States.[2]

According to the decisions of the supreme court of the United States the state court has jurisdiction to inquire by what authority the petitioner is restrained of his liberty, but when, in response to such inquiry, it is shown that he is held in custody under the process of a federal court, the powers of the state court are at an end. It can not go further and inquire whether such custody is lawful or not.[3] And as in most of the states the applicant for the writ is required to show, by his petition, by what claim of right he is deprived of his liberty, and the grounds upon which he claims his detention to be illegal, the jurisdiction will generally terminate where it begins. This being so, it would perhaps be more consistent, and more in accordance with the law as thus declared, to say that the state courts have no jurisdiction to issue and enforce the writ of *habeas corpus* in any case where the petitioner is restrained of his liberty under or by virtue of the judgment, order, or process of a federal court, or by an officer of the general goverment acting under its laws.

The doctrine that the state courts have no power to interfere is not confined to cases where the prisoner is held in custody under a judgment or process of a federal court, but is extended to detentions by officers or agents of the national government acting under its laws,[4] although in some of the decisions it has been confined to cases where the custody is by virtue of the judgment, order, or process of a federal court or judge, and held not to extend to cases

[1] In re Hopson, 40 Barb. 34; People *v.* Fiske, 45 How. Pr. 294; Ohio & Miss. R. R. Co. *v.* Fitch, 20 Ind. 498, 505; Copenhaver *v.* Stewart, 24 S. W. Rep. 161; In re O'Connor, 48 Barb. 258; In re Ferguson, 9 Johns. 239; State *v.* Zulich, 29 N. J. Law, 409.

[2] Ableman *v.* Booth, 21 How. 506; United States *v.* Tarble, 13 Wall. 397; Covell *v.* Heyman, 111 U. S. 176; 4 Sup. Ct. Rep. 355; Cooley Const. Lim., *p. 347.

[3] Ableman *v.* Booth, 21 How. 506; Cooley Const. Lim. *p. 347

[4] United States *v.* Tarble, 13 Wall. 397; In re Ferguson, 9 Johns. 239.

of detention by government officers not acting under judicial authority or claiming so to act.[1]

The decisions of the United States supreme court on the subject are direct and emphatic, although there has been some division of opinion on the part of the members of the court. But it can not be denied that the reasoning of the decisions on the other side is strong and cogent. So much so that it is difficult not to feel convinced, after a reading of the decisions for and against the jurisdiction of the state courts in this class of cases, that such jurisdiction should and does exist. But as the supreme court of the United States is the final arbiter upon the question, it must be taken to be the law that they have no such jurisdiction.[2]

It does not follow, however, from the rule thus established, that the state courts have no power to determine, under an application for the writ, the rights, privileges, or immunities derived from the nation, or place a construction upon the constitution or laws of the United States, in proper cases. On the contrary, it is distinctly held that where the question is not as to the power or authority of the courts or officers of the federal government, but as to the right or authority of some one not acting for or on behalf of the general government, but acting under and by virtue of its laws, or claiming to do so, the state courts have jurisdiction to inquire into the validity of his acts, and in so doing to pass upon and construe the laws of the United States under which he claims to have authority to act.[3]

The federal courts have jurisdiction to discharge one held in custody in violation of the constitution or laws of the United States, although so held in custody by a state

[1] Exparte Barrett, 42 Barb. 479; Ohio & Miss. R. R. Co. *v.* Fitch, 20 Ind. 498, 505.

[2] Cooley Const. Lim. *p. 347.

[3] Robb *v.* Connolly, 111 U. S. 624; 4 Sup. Ct. Rep. 544; Ex parte Royall, 117 U. S. 241; 6 Sup. Ct. Rep. 734. A different rule was declared in the case, In re Robb, 19 Fed. Rep. 26, where it was held that because the petitioner was acting under a law of the United States the federal courts had exclusive jurisdiction over the writ.

court.[1] But the fact that in the trial of the accused for the offense the state court must pass upon the validity or construction of the laws of the United States, in determining his guilt or innocence, does not give the federal courts such jurisdiction. The state court has the same power to support, construe, and give effect to the laws of the general government that the federal courts possess, and the fact that it may err in the construction of such laws, to the injury of a party charged with a crime, gives the federal courts no jurisdiction to interfere by *habeas corpus*.[2]

Generally it is held that an order or judgment denying a writ of *habeas corpus* does not bar another application for the writ.[3] But it is made a bar by statute in some of the states.[4] And it is held, in some of the cases, to be a bar even where the proceeding is before a judge and not before a court.[5] And it is held that a judgment discharging the petitioner is a bar.[6] But this is usually the result of statutory provisions.

As to the question of venue, the courts usually have jurisdiction over the territory covered by their general jurisdiction,[7] and in some of the states the writ is required to be applied for or returned at a particular place.[8] The writ may properly be issued by one court or judge and be made returnable before another.[9] The effect of an application for a change of venue has been considered in previous sections.[10]

[1] Ex parte Royall, 117 U. S. 241; 6 Sup. Ct. Rep. 734; Ex parte Neagle, 39 Fed. Rep. 833; In re Monroe, 46 Fed. Rep. 52.

[2] Ex parte Ulrich, 43 Fed. Rep. 661; Ex parte Young, 50 Fed. Rep. 526.

[3] Ex parte Cuddy, 40 Fed. Rep. 62; Weir *v.* Marley, 99 Mo. 484; 12 S. W. Rep. 798; In re Ring, 28 Cal. 248.

[4] Ex parte Hamilton, 65 Miss. 98; 3 Sou. Rep. 68.

[5] Ex parte Scott, 1 Dak. 140; 46 N. W. Rep. 512.

[6] Weir *v.* Marley, 99 Mo. 484; 12 S. W. Rep. 798; Grady *v.* Superior Court, 64 Cal. 155; 30 Pac. Rep. 613.

[7] In re Strickland, 41 La. Ann. 324; 6 Sou. Rep. 577.

[8] Ex parte Trader, 24 Tex. App. 393; 6 S. W. Rep. 533; In re Doll, 47 Minn. 518; 50 N. W. Rep. 607.

[9] Ex parte Trader, 24 Tex. App. 393; 6 S. W. Rep. 533.

[10] *Ante*, secs. 46, 47, 51.

It was there shown that in some cases, depending upon the grounds for the change, the application therefor, properly made, deprived the court, absolutely, of all jurisdiction to proceed further in the action. But even in the states in which this is held to be the effect of the application it is maintained that *habeas corpus* is not the proper remedy where the court from which the change is asked proceeds with the action in such way as to result in imprisonment.[1]

The case cited is clearly inconsistent with the well-settled rule in Indiana that the filing of a proper affidavit for a change of venue makes it the imperative duty of the court to grant the change, and that after the filing of such an affidavit and a demand for the change the court can exercise no further jurisdiction in the case, except upon the theory that the court has jurisdiction to determine the sufficiency of the affidavit, and that its ruling upon that question is an error which can only be reviewed by writ of error or appeal. The authorities in that state hold that upon the filing of a sufficient affidavit the jurisdiction of the court is at an end.[2] Following this doctrine to its legitimate and logical results, it was held in a later case that a defendant in a criminal case having filed the proper affidavit was entitled to his discharge where the court proceeded with the action.[3]

83. QUO WARRANTO.—The writ of *quo warranto* is a common-law prerogative writ in the nature of a writ of right.[4] It was formerly an original writ issuing out of chancery,[5] and was a purely civil remedy.[6] Its object is

[1] Turner *v.* Conkey, 132 Ind. 248; 31 N. E. Rep. 777.

[2] Krutz *v.* Howard, 70 Ind. 174; Shoemaker *v.* Smith, 74 Ind. 71, 76; Smelzer *v.* Lockhart, 97 Ind. 315; Manly *v.* State, 52 Ind. 215; Duggins *v.* State, 66 Ind. 350.

[3] Smelzer *v.* Lockhart, 97 Ind. 315. But this case is expressly overruled in Turner *v.* Conkey, 132 Ind. 248; 31 N. E. Rep. 777, above cited.

[4] 19 Am. & Eng. Enc. of Law, 660; High Ext. Leg. Rem., sec. 591; 3 Blk. Com. *p. 262.

[5] High Ext. Leg. Rem., sec. 592.

[6] High Ext. Leg. Rem., sec. 600; State *v.* Vail, 53 Mo. 97.

to inquire into and determine the right to hold and exercise a public office or franchise.[1]

The writ has been superseded almost entirely in England and in this country by the information in the nature of *quo warranto*, which is a different form of proceeding to accomplish practically the same objects.[2] The modern proceeding by information has been defined as "an information, criminal in form, presented to a court of competent jurisdiction, by the public prosecutor, for the purpose of correcting the usurpation, misuser, or non-user of a public office or corporate franchise."[3]

The definition does not cover the proceeding, which is not criminal in form, nor required to be presented by the public prosecutor, in many of the states, but is, perhaps, as accurate as it can be made as applicable to the various statutes modifying and controlling the jurisdiction and practice in such proceedings. In many of the states statutes have been enacted providing for the contest of elections to public offices and the procedure in such cases,[4] and proceedings in the nature of *quo warranto* have been provided by statute in some of the states.[5] So in some of the states special provisions are made for the contest of elections to offices of private corporations.[6] And in some both the writ of *quo warranto* and the information have been abolished and a civil action substituted in their place.[7] But this is a change in the form of the proceeding rather than in its substance and leaves the remedy much as it was before.[8]

[1] 19 Am. & Eng Enc. of Law, 660; State *v.* Evans, 3 Ark. 585; 36 Am. Dec. 468; State *v.* Brown, 31 N. J. Law, 355.

[2] 19 Am. & Eng. Enc. of Law, 661; High Ext. Leg. Rem., secs. 591, 600; 3 Blk. Com. *p. 264; 4 Blk. Com. *pp. 312, 441; Commonwealth *v.* Murray, 11 Serg. & Raw. 73; 14 Am. Dec. 614; State *v.* Brown, 31 N. J. Law, 355; State *v.* Vail, 53 Mo. 97.

[3] High Ext. Leg. Rem., secs. 591, 603.

[4] People *v.* Cook, 8 N. Y. 67; 59 Am. Dec. 451.

[5] State *v.* Vail, 53 Mo. 97.

[6] Wickersham *v.* Brittan, 93 Cal. 34; 28 Pac. Rep. 792; 29 Pac. Rep. 51.

[7] People *v.* Cook, 8 N. Y. 67; 59 Am. Dec. 451; State *v.* Messmore, 14 Wis. 115.

[8] People *v.* Hall, 80 N. Y. 117; People *v.* Boughton, 5 Colo. 487.

So it may be said that as a general rule the proceeding, whatever its form may be, has become almost entirely statutory in this country and must be controlled by statutory provisions.[1] But, while the information in the nature of *quo warranto* has, in a great measure, superseded the writ of *quo warranto*, courts may still exercise jurisdiction by and through the writ itself unless prohibited by constitutional or statutory law.[2] And it is still enforced in some of the states.[3]

So a court having constitutional jurisdiction of informations in the nature of *quo warranto* may exercise such jurisdiction notwithstanding a statute providing a different form of action for the usurpation of an office or franchise.[4] And the remedies by way of contesting elections under statutes providing therefor are generally held to be cumulative and not to deprive the courts of the power to inquire into the matter of elections to office by *quo warranto* or the information in the nature of *quo warranto*.[5]

A different rule is maintained, however, in some of the states, where it is held that the proceeding provided for the contest of elections takes away the power of the courts to apply the remedy of *quo warranto* to accomplish the same result.[6] But this, in some of the cases, is based upon the ground that the statute providing the special remedy appears by its terms to intend that such remedy shall be

[1] Williams *v.* State, 69 Tex. 368; 6 S. W. Rep. 845; State *v.* Mills, 27 Pac. Rep. 560; People *v.* Hall, 80 N. Y. 117; People *v.* Dashaway Ass'n, 84 Cal. 114; 24 Pac. Rep. 277; State *v.* Vail, 53 Mo. 97.

[2] Attorney-General *v.* Barstow, 4 Wis. 567.

[3] High Ext. Leg. Rem. sec. 609. [4] People *v.* Boughton, 5 Colo. 487.

[5] High Ext. Leg. Rem., sec. 624; State *v.* Boyd, 31 Neb. 682; 48 N. W. Rep. 739; State *v.* Frazier, 28 Neb. 438; 44 N. W. Rep. 471; People *v.* Londoner, 13 Colo. 303; 22 Pac. Rep. 764; Conger *v.* Convery, 52 N. J. Law, 417; 20 Atl. Rep. 166; Convery *v.* Conger, 53 N. J. Law, 658; 24 Atl. Rep. 1002; Snowball *v.* People, 35 N. E. Rep. 538; People *v.* Hall, 80 N. Y. 117; State *v.* Melike, 81 Wis. 574; 51 N. W. Rep. 875.

[6] State *v.* Marlow, 15 Ohio St. 114, 133; Commonwealth *v.* Leech, 44 Pa. St. 332; Commonwealth *v.* Garrigues, 28 Pa. St. 9; 70 Am. Dec. 103; Commonwealth *v.* Baxter, 35 Pa. St. 263; People *v.* Every, 38 Mich. 405; Parks *v.* State, 13 Sou. Rep. 756.

exclusive. Where this intention does not appear the remedy should be regarded as cumulative only, as it is so considered in most of the cases.

Courts of equity have no jurisdiction to declare a forfeiture against a corporation and oust it of its franchises unless such jurisdiction is expressly conferred upon it by statute.[1]

The state constitutions usually confer power upon the courts of general jurisdiction to issue writs of *quo warranto*.[2] This has generally been held to include informations in the nature of *quo warranto*,[3] and to confer original and not appellate jurisdiction.[4] Therefore, a court having only appellate jurisdiction, and not authorized expressly to entertain jurisdiction in *quo warranto*, has no such jurisdiction.[5]

The jurisdiction includes the power to inquire into the existence of private corporations claiming to act under or by virtue of franchises granted by the state, or by the laws of the state authorizing the organization of corporations,[6] and the right to hold office under such corporations,[7] and to inquire whether existing corporations have a right to exist, or to exercise any or all of the franchises they assume to exercise.[8]

The power also extends to municipal corporations[9] and their officers;[10] and it is held, that in order to determine whether an officer is rightfully holding and exercising the duties of a municipal office, it may be determined whether

[1] Baker *v.* Backus, 32 Ill. 79, 110; Hullman *v.* Honcomp, 5 Ohio St. 237.

[2] High Ext. Leg. Rem., secs. 610, 616; State *v.* Baker, 38 Wis. 71.

[3] High Ext. Leg. Rem., sec. 610; State *v.* West Wis. Ry. Co., 34 Wis. 197; State *v.* Anderson, 26 Fla. 240; 8 Sou. Rep. 1; State *v.* Gardner, 54 N. W. Rep. 606.

[4] Attorney-General *v.* Blossom, 1 Wis. 317.

[5] Ex parte Attorney-General, 1 Cal. 85.

[6] High Ext. Leg. Rem., sec. 648.

[7] High Ext. Leg. Rem., sec. 653.

[8] Commonwealth *v.* Towanda Water Works, 15 Atl. Rep. 440.

[9] People *v.* City of Oakland, 92 Cal. 611; 28 Pac. Rep. 807; State *v.* Tracy, 48 Minn. 497; 51 N. W. Rep. 613.

[10] People *v.* Carpenter, 24 N. Y. 86.

the corporation itself is legally in existence or not.[1] But there are cases holding to the contrary.[2]

As the jurisdiction extends to the question of the existence, and of the right to exist, the inquiry may be whether the persons claiming to be a corporation have been legally organized as such, or whether, if legally organized, the corporation, not the individuals, has done or omitted to do some act which forfeits its charter or deprives it of the right to exist.[3] In the one case the proceeding is against the individuals to declare that they are not a corporation.[4] In the other it is a proceeding against the corporation to declare that it shall exist, or exercise some or all of its franchises, no longer.[5]

It is generally held that to bring the action against a corporation, as such, is to admit that it is a corporation, and, therefore, where it is alleged that no corporation exists the action must, necessarily, be against the persons who are claiming to be such.[6] But in some of the cases against municipal corporations it is held that the proceeding is properly instituted against the corporation by name as a *de facto* corporation.[7]

[1] People *v.* Carpenter, 24 N. Y. 86; Territory *v.* Armstrong, 6 Dak. 226; 50 N. W. Rep. 832.

[2] People *v.* Gunn, 85 Cal. 238; 24 Pac. Rep. 718; High Ext. Leg. Rem., sec. 696.

[3] 1 Blks. Com., *p. 485; State *v.* Atchison, etc., R. R. Co., 24 Neb. 143; 8 Am. St. Rep. 164; 38 N. W. Rep. 43.

[4] People *v.* City of Spring Valley, 129 Ill. 169; 21 N. E. Rep. 843; People *v.* Stanford, 77 Cal. 360; 18 Pac. Rep. 85; 19 Pac. Rep. 693; Mud Creek Draining Co. *v.* State, 43 Ind. 236; State *v.* Hannibal, etc., Gravel R. Co., 37 Mo. App. 496, 503.

[5] State *v.* Somerby, 42 Minn. 55; 43 N. W. Rep. 689; People *v.* City of Spring Valley, 129 Ill. 169; 21 N. E. Rep. 843; People *v.* Stanford, 77 Cal. 360; 18 Pac. Rep. 85; 19 Pac. Rep. 693; State *v.* Taylor, 25 Ohio St. 279; State *v.* Pittsburg Y. & A. R. Co., 33 N. E. Rep. 1051; State *v.* Atchison, etc., R. R. Co., 24 Neb. 143; 8 Am. St. Rep. 164; 38 N. W. Rep. 43.

[6] People *v.* City of Spring Valley, 129 Ill. 169; 21 N. E. Rep. 843; People *v.* Stanford, 77 Cal. 360; 18 Pac. Rep. 85; 19 Pac. Rep. 693; State *v.* Cincinnati Gas Light, etc., Co., 18 Ohio St. 262; Mud Creek Draining Co. *v.* State, 43 Ind. 236; State *v.* Hannibal, etc., Gravel R. Co., 37 Mo. App. 496, 503.

[7] State *v.* Board of Commissioners, 50 N. J. Law, 457; 14 Atl. Rep. 560;

In this respect a distinction is made, in some of the cases, between a municipal and a private corporation; and it is held that in all cases where the invalidity of the charter of a municipal corporation is attacked the municipality is a necessary party, and that the question can not be determined in a proceeding against one claiming to be an officer of the municipality.[1] And cases can be found which apply the same rule to private corporations.[2] But the well-settled rule is the other way, as it affects private corporations, as shown above.

A distinction is also made between a case where it is charged that the alleged corporation never existed and one where it is alleged that it has existed, as a *de facto* corporation, and the proceeding is to dissolve it, on the ground of defects in its organization.[3] But this distinction does not seem to rest on any solid foundation. A proceeding by *quo warranto* involves the existence *de jure* of a corporation, and the question whether it has been, or is, a *de facto* corporation, is wholly immaterial.

Formerly the proceeding was regarded as a criminal proceeding, and the writ, or the information, was, therefore, prosecuted in the name of the prosecuting officer of the government.[4] Under most of the statutes of the present day the proceeding is treated as civil in its nature.[5] But it is in a sense a criminal proceeding in its nature and objects,[6] and is held to be a criminal proceeding in some of the states.[7] It is not intended to enforce official action,

State *v.* Village of Bradford, 32 Vt. 50; People *v.* City of Riverside, 66 Cal. 288; 5 Pac. Rep. 350; People *v.* Gunn, 85 Cal. 238; 24 Pac. Rep. 718; State *v.* Tracy, 48 Minn. 497; 51 N. W. Rep. 613.

[1] People *v.* Gunn, 85 Cal. 238; 24 Pac. Rep. 718; High Ext. Leg. Rem., sec. 696.

[2] People *v.* Flint, 64 Cal. 49; 28 Pac. Rep. 495.

[3] People *v.* Montecito Water Co., 97 Cal. 276; 32 Pac. Rep. 236.

[4] High Ext. Leg. Rem., sec. 591; 4 Blk. Com. *p. 312.

[5] 19 Am. & Eng. Enc. of Law, 662; Jones *v.* State, 112 Ind. 193; 13 N. E. Rep. 416; State *v.* Kupferle, 44 Mo. 154; 100 Am. Dec. 265; Davis *v.* State, 75 Tex. 420; 12 S. W. Rep. 957; State *v.* Evans, 33 S. Car. 612; 12 S. E. Rep. 816; State *v.* Vail, 53 Mo. 97.

[6] 4 Blk. Com. *p. 312.

[7] People *v.* Ridgley, 21 Ill. 64.

as in case of *mandamus*,[1] nor to forbid it as by prohibition,[2] or injunction,[3] nor to divest a corporation of the ownership of property,[4] but to enforce a penalty for doing or failing to do some act forbidden or required by law to be done.[5]

The penalty imposed is generally nothing more than the deprivation of the corporation or person of the enjoyment of a right, office or franchise. Formerly there was added to this a pecuniary penalty or fine,[6] and this penalty is still imposed under the statutes of some of the states,[7] while in others the courts are allowed, in their discretion, to impose a fine in lieu of the judgment of ouster.[8]

The writ or information is not allowed as of course, as a rule, but is only issued by leave of court first obtained, particularly where it is prosecuted in the interest of a private individual.[9] There is a difference in this respect, however, between the writ of *quo warranto* or an information on behalf of the state, by the proper officer, and a pro-

[1] State *v.* Shakespeare, 41 La. Ann. 156; 6 Sou. Rep. 592.

[2] Bruner *v.* Superior Court, 92 Cal. 239; 28 Pac. Rep. 341; State *v.* Evans, 3 Ark. 585; 36 Am. Dec. 468.

[3] People *v.* Whitcomb, 55 Ill. 172; High Ext. Leg. Rem., sec. 637; Hinkley *v.* Breen, 55 Conn. 119; 9 Atl. Rep. 31; Stultz *v.* State, 65 Ind. 492.

[4] State *v.* Pittsburg Y. & A. R. Co., 33 N. E. Rep. 1051.

[5] The case of People *v.* City of Oakland, 92 Cal. 611; 28 Pac. Rep. 807, is opposed to the well settled rule that the proceeding can not be maintained to prevent wrongful action by a corporation. That was a proceeding to prevent a city from enforcing taxation upon, and governing territory outside of its limits. But this is upon the ground that the exercise of the power of taxation is itself the usurpation of a franchise. See also City of East Dallas *v.* State, 73 Tex. 371; 11 S. W. Rep. 1030. But see to the contrary, Stultz *v.* State, 65 Ind. 492. The remedy has also been allowed to prevent a judge from holding a term of court in a place not organized as a county. State *v.* Osborn, 36 Kan. 530; 13 Pac. Rep. 850.

[6] 4 Blk. Com. *p. 312.

[7] State *v.* Haines, 48 N. J. Law, 25; 8 Atl. Rep. 723.

[8] People *v.* Improvement Co., 103 Ill. 491.

[9] High Ext. Leg. Rem., secs. 607, 608, 609; People *v.* Waite, 70 Ill. 25; Vrooman *v.* Michie, 69 Mich. 42; 36 N. W. Rep. 749; People *v.* North Chi. Ry. Co., 88 Ill. 537; State *v.* Smith, 48 Vt. 266; People *v.* Keeling, 4 Colo. 129; State *v.* Tolan, 33 N. J. Law, 195.

ceeding in behalf of a private individual. In the former case no leave is necessary.[1] But it is otherwise in the latter, in some of the states, where the proceeding is treated as an ordinary one to be commenced and prosecuted as of right and without leave of court.

A court of superior jurisdiction may refuse to entertain the proceeding on the ground that it may be prosecuted in local courts of inferior jurisdiction.[2] In most of the states the proceeding is still required to be commenced and prosecuted in the name of the state or some officer of the state,[3] either for the people generally, or on the relation and for the benefit of some citizen having a peculiar interest in the controversy, or, in some of the states, on the relation of a voter and tax-payer having no other interest.[4] But even this is not required in some of the states. The proceeding is allowed to be instituted by a private individual where the proper officer refuses to act,[5] and in some states without calling upon such officer, upon leave granted, where the individual has, or claims to have, a superior claim to the office,[6] or without leave in other states.[7] But in such cases the proceeding is a civil statutory proceeding affecting primarily a mere private right and differs essentially from the proceeding by *quo warranto* or information in the nature of *quo warranto* as well understood.

There is a clear distinction between an information by the proper officer of the state on its behalf which may be presented as of right without leave, and one by or on behalf of private relators, which can only be presented by leave of court, unless otherwise provided by statute.[8]

It is usually held that the remedy can be enforced in favor of a private individual only as against an officer, or

[1] State *v.* Stone 25 Mo. 555. [2] State *v.* Vail, 53 Mo. 97.

[3] State *v.* Mayor, 49 N. J. Law, 515; 10 Atl. Rep. 377.

[4] State *v.* Hall, 111 N. Car. 369; 16 S. E. Rep. 420.

[5] State *v.* Frazier, 28 Neb. 438; 44 N. W. Rep. 471.

[6] Vrooman *v.* Michie, 69 Mich. 42; 36 N. W. Rep. 749; People *v.* Board of Supervisors, 51 N. W. Rep. 1114.

[7] State *v.* Mills, 27 Pac. Rep. 560.

[8] State *v.* Mayor, 49 N. J. Law, 515; 10 Atl. Rep. 377; People *v.* North Chi. Ry. Co., 88 Ill. 537.

one claiming to be an officer of a corporation, and not against the corporation; and that all proceedings to inquire into the existence of the corporation, or its right to exist, directly or indirectly, must be instituted and carried on in the name of the state;[1] but the right, on the part of the state, to oust one who is claiming to exercise the duties of an office, on the ground that no such office exists, by reason of the fact that the municipality has not been legally organized, has been maintained under the codes and statutes of some of the states, although the common law rule was undoubtedly the other way.[2]

In order to authorize the issuance of the writ an actual user or possession of the office or franchise must be shown. A mere claim of right to such user is not enough.[3] In most of the states jurisdiction to issue the writ or entertain the information is conferred upon courts of superior jurisdiction, and particularly the appellate courts of last resort, by the constitution. Where so conferred it can not be taken away by statute,[4] unless such power is conferred upon the legislature by the constitution.[5]

The power to issue the writ or to entertain an appeal in this class of cases is sometimes limited by the amount in controversy,[6] but this is not usually the case.

The constitutionality of a statute may be tested by the proceeding;[7] but only where the question of the right to exercise the office or franchise is affected by it and not

[1] State *v.* Mayor, 49 N. J. Law, 515; 10 Atl. Rep. 377; People *v.* North Chi. Ry. Co., 88 Ill. 537; State *v.* Vickers, 51 N. J. Law, 180; 17 Atl. Rep. 153.

[2] State *v.* Parker, 25 Minn. 215; People *v.* Carpenter, 24 N. Y. 86; Commonwealth *v.* Fowler, 10 Mass. 290.

[3] People *v.* Thompson, 16 Wend. 654.

[4] State *v.* Baker, 38 Wis. 71; People *v.* Bingham, 82 Cal. 238; 22 Pac. Rep. 1039; Conger *v.* Convery, 52 N. J. Law, 417; 20 Atl. Rep. 166.

[5] State *v.* Marlow, 15 Ohio St. 114, 133; State *v.* Harmon, 31 Ohio St. 250, 260.

[6] State *v.* Shakespeare, 41 La. Ann. 156; 6 Sou. Rep. 592; People *v.* Perry, 79 Cal. 105; 21 Pac. Rep. 423; People *v.* Bingham, 82 Cal. 238; 22 Pac. Rep. 1039.

[7] Attorney-General *v.* Perkins, 73 Mich. 303; 41 N. W. Rep. 426; People *v.* Riorden, 73 Mich. 508; 41 N. W. Rep. 482.

where the question is as to the power to do some act by virtue of the statute.[1]

The jurisdiction to inquire into the right to hold public offices is not confined to any class or classes of offices, but extends to all, executive, judicial, legislative, administrative, ministerial, and military.[2]

Sometimes the power to determine the right to an office in a legislative body is vested in the body itself, in which case it is sometimes held that the jurisdiction thus granted is exclusive and that the courts have no power to inquire into such right,[3] especially where such power is vested in the legislative body by the constitution.[4]

In other of the cases, however, a different view of the matter is taken, it being held that the jurisdiction of the courts is not taken away by vesting the same jurisdiction in the body of which the party to be affected is, or claims to be, a member.[5] This is the better rule on the subject where the power of the legislative body is merely statutory. In those states in which it is held that a statutory jurisdiction to hear a contest by the body of which the party claims to be a member is exclusive, it is held that this only extends to the mere question whether the party has been elected to the office or not and that the courts still have the power to inquire whether there is in fact any such office or whether there is any law authorizing the election.[6]

The jurisdiction does not depend upon the manner in which the right to hold an office is claimed to have been obtained, whether by charter, by appointment, or by pop-

[1] People *v.* Whitcomb, 55 Ill. 172; State *v.* Baughman, 38 Ohio St. 455, 459.

[2] High Ext. Leg. Rem., secs. 634, 635, 637; State *v.* Boyd, 31 Neb. 682; 48 N. W. Rep. 739.

[3] People *v.* Metzker, 47 Cal. 524; State *v.* Berry, 47 Ohio St. 232; 24 N. E. Rep. 266.

[4] State *v.* Tomlinson, 20 Kan. 692.

[5] People *v.* Hall, 80 N. Y. 117; People *v.* Bingham, 82 Cal. 238; 22 Pac. Rep. 1039; State *v.* Anderson, 26 Fla. 240; 8 Sou. Rep. 1.

[6] Commonwealth *v.* Meeser, 44 Pa. St. 341; Commonwealth *v.* Fowler, 10 Mass. 290; State *v.* O'Brien, 47 Ohio St. 464; 25 N. E. Rep. 121.

ular election, but extends to all cases.[1] In cases of popular elections the returns or certificates of canvassing boards or officers are not conclusive upon the courts,[2] nor is the certificate or commission issued by the governor or other proper officer conclusive.[3]

The remedy is extraordinary and will not be administered where the party has an adequate remedy by ordinary proceedings at law;[4] but the fact that another remedy is given to private individuals does not take away the right of the state to the remedy of *quo warranto*.[5]

In order to authorize a forfeiture of the franchises of a corporation, at the instance of the state, the acts complained of as working a forfeiture must be such as work or threaten a substantial injury to the public;[6] and, therefore, if the wrongs complained of affect the stockholders of the corporation only, and they have another remedy, the courts will not interfere by *quo warranto*.[7]

The remedy is only applicable where the public has an interest, and, therefore, can not be used against persons alleged to have assumed a merely private office or trust not affecting the public interests,[8] nor can it be used to test the right to exercise a mere temporary employment.[9]

Under the proceeding, instituted on behalf of the people, or on the relation of a private individual, it is usually held that the question as to the defendant's right to an office alone will be determined and not whether the relator

[1] High Ext. Leg. Rem., sec. 626.

[2] High Ext. Leg. Rem., secs. 638, 639. [3] State *v.* Vail, 53 Mo. 97.

[4] High Ext. Leg. Rem., sec. 617; Tarbox *v.* Sughrue, 36 Kan. 225; 12 Pac. Rep. 935; People *v.* Cooper, 139 Ill. 461; 29 N. E. Rep. 872.

[5] Commonwealth *v.* Towanda Water Works, 15 Atl. Rep. 440; Territory *v.* Virginia Road Co., 2 Mont. 96.

[6] State *v.* Minnesota, etc., Co., 40 Minn. 213; 41 N. W. Rep. 1020; Attorney-General *v.* Detroit Suburban Ry. Co., 96 Mich. 65; 55 N. W. Rep. 562.

[7] State *v.* Minnesota, etc., Co., 40 Minn. 213; 41 N. W. Rep. 1020.

[8] High Ext. Leg. Rem., secs. 620, 625; Commonwealth *v.* Dearborn, 15 Mass. 125.

[9] Bruner *v.* Superior Court, 92 Cal. 239, 248; 28 Pac. Rep. 341; People *v.* Cain, 47 N. W. Rep. 484.

was elected;[1] but a different rule prevails where a contest of the office, by or on behalf of one claiming the office, is allowed by statute. In such cases the question is one of right between the two claimants, and the relator, or contestant, can only recover upon his own right to the office, and he is entitled to have his right determined, and if elected, to have the office awarded to him in addition to the usual judgment of ouster against the defendant.[2] In such cases the relator must establish his right to the office.[3] A foreign corporation may be deprived of the right to do business in a state on account of wrongful acts committed by it in connection with its franchise to do business therein.[4]

84. NEW TRIALS AND VACATION OF JUDGMENTS. There are various ways by which a party may be relieved from an erroneous or void judgment, amongst others by a new trial, by vacation of judgment on motion made in the court in which the judgment was rendered,[5] by injunction,[6] by proceedings for a new trial in a court of equity,[7] by writ of error,[8] by appeal,[9] by writ of *audita querela*,[10] by *certiorari*,[11] by bill of review, or in the nature of a bill

[1] State *v.* Lane, 16 R. I. 620; 18 Atl. Rep. 1035.

[2] People *v.* Ryder, 12 N. Y. 433; People *v.* Londoner, 13 Colo. 303; 22 Pac. Rep. 764.

[3] State *v.* Hamilton, 29 Neb. 198; 45 N. W. Rep. 279; State *v.* Kennerly, 26 Fla. 608; 8 Sou. Rep. 310.

[4] State *v.* Western Un., etc., Soc., 47 Ohio St. 167; 24 N. E. Rep. 392; State *v.* Fidelity, etc., Ins. Co., 49 Minn. 538; 41 N. W. Rep. 108; State *v.* Fidelity, etc., Co., 77 Ia. 648; 42 N. W. Rep. 509; State *v.* Fidelity, etc., Ins. Co., 49 Ohio St. 440; 31 N. E. Rep. 658.

[5] 1 Black on Judg., secs. 297, 303; Kemp *v.* Cook, 18 Md. 130; 79 Am. Dec. 681.

[6] *Ante*, sec. 79.

[7] Freeman on Judg., sec. 484a.

[8] *Post*, sec. 85; Freeman on Judg., sec. 94; 1 Black on Judg., sec. 300.

[9] *Post*, sec. 88.

[10] Freeman on Judg,, sec. 95; 1 Black on Judg., sec. 299; Sawyer *v.* Cross, 65 Vt. 158; 26 Atl. Rep. 528.

[11] *Post*, sec. 86.

of review, in a court of equity,[1] by a writ of review,[2] by a writ of *recordari*,[3] or by direct action.[4]

With respect to the writ *audita querela* it has become almost obsolete, although still existing in some of the states. Its object is to relieve a party from the wrongful acts of his adversary and to permit him to show matter of discharge which may have occurred since the rendition of the judgment. It is in the nature of a bill in equity having the incidents of a regular suit.[5]

As to the proceedings by writ of error, *certiorari*, appeal, and review, they will be considered in other sections.[6]

It is not so important, in this connection, to dwell upon the forms of proceeding by which a party may be relieved from a judgment, as to determine the extent to which the courts may go in such cases, and by what courts the relief may be administered. And, like almost every question that can arise with respect to the jurisdiction of courts, the subject is controlled in part by the common law and in part by statutory provisions in the different states.

The power to grant new trials, in cases tried before them, is inherent in all courts of superior jurisdiction.[7] The same is true of the power to vacate their own judgments.[8] And being inherent the power can not be taken from them by statute.[9]

Whether courts of inferior jurisdiction have such inherent power or not, is a matter of much question. Many of the cases confine the power to courts of record,[10] and others hold

[1] Freeman on Judg., sec. 484a; 1 Black on Judg., sec. 301; Story Eq. Pl., sec. 426.

[2] *Post*, sec. 87; In re Pedrorena, 22 Pac. Rep. 71.

[3] King *v.* Wilmington & W. R. Co., 112 N. Car. 318; 16 S. E. Rep. 929.

[4] 1 Black on Judg., sec. 302; Earle *v.* Earle, 91 Ind. 27.

[5] Freeman on Judg., sec. 95. [6] *Post*, secs. 85, 86, 87, 88.

[7] *Ante*, sec. 27; Commonwealth *v.* McElhaney, 111 Mass. 439.

[8] *Ante*, sec. 27; Freeman on Judg., secs. 98, 99; 1 Black on Judg., sec. 497; Vanderbilt *v.* Schreyer, 81 N. Y. 646.

[9] *Ante*, secs. 24, 27; 1 Black on Judg., sec. 298.

[10] *Ante*, sec. 27, p. 180.

that inferior courts have no such power, without determining what are and what are not courts of inferior jurisdiction.[1]

Some of the cases make a distinction between the power to vacate or modify a judgment and the power to grant new trials, holding that the former exists in all courts of record, but not the latter.[2] And it is held that where the power exists at common law it may be taken away by statute.[3] The effort has been made in earlier sections of this work to find the dividing line between courts of inferior and those of superior jurisdiction, but with very indifferent success.[4]

The dividing line has grown less distinct, if possible, of later years; and at the present time there are but few courts which do not possess power over their own records, or proceedings, to the extent of granting new trials and vacating their own judgments, although such do exist in some of the states under the limitations of their statutes or decided cases. It is a limitation, however, that is not supported by any sound reason, and has, probably for that reason, been very generally removed, or held not to exist.[5] Yet it is very generally held that inferior statutory courts have only such powers as are expressly conferred upon them by the statute and such incidental powers as are necessary to carry out the jurisdiction expressly conferred; and that, therefore, they have no general equity powers, independently of the statutes, which will authorize them to vacate or annul a judgment for fraud or upon other grounds.[6]

While these inherent powers still exist in the courts, they may nevertheless be limited by statutory law and the

[1] *Ante*, sec. 27, p. 180; Bartling *v.* Jamison, 44 Mo. 141.

[2] Bartling *v.* Jamison, 44 Mo. 141.

[3] Cortleyou *v.* Ten Eyck, 22 N. J. Law, 45. [4] *Ante*, secs. 6, 7.

[5] *Ante*, sec. 27; Rottman *v.* Schmucker, 94 Mo. 139; 7 S. W. Rep. 117; Clements' Appeal, 25 N. J. Eq. 508.

[6] Brown *v.* Goble, 97 Ind. 86; Doctor *v.* Hartman, 74 Ind. 221; Foist *v.* Coppin, 35 Ind. 471; Corby *v.* Wayne Probate Judge, 96 Mich. 11; 55 N. W. Rep. 386; State *v.* Duncan, 56 N. W. Rep. 214.

time and manner of their exercise regulated within proper limits.[1] And this has been done almost universally. The statutes on the subject differ in many respects. They specify, as a rule, the grounds upon which new trials may be granted, provide the means or the proceedings by which relief by way of new trial, or the vacation of judgments, may be obtained, the time when relief shall be demanded, and otherwise regulate the proceedings by which relief may be had.

It will aid us in arriving at the true rules affecting jurisdiction in this class of proceedings if we keep in mind the fact that the power to grant new trials, and vacate judgments, existed before these statutes were enacted, and that the jurisdiction still exists independently of, and, sometimes, in spite of them. In other words, the statutes are not grants of jurisdiction, but limitations upon a jurisdiction already existing. But this inherent power which exists without the aid of written law, and of which the courts can not be deprived by the legislature, does not apply to all of the causes for which new trials may be granted. It exists for the protection of the courts and litigants from fraudulent imposition, and from the effects of pretended judgments which the court never intended to render, which were obtained through mistake or inadvertence, or which are void for other reasons. Respecting the right to new trials, or other relief, on account of mere errors, the subject is within the legislative control. But, while the legislature may control and regulate the inherent powers of the courts to grant new trials or vacate judgments, it can not, under the guise of regulation, take away or materially impair the right of litigants to the protection of the courts through the exercise of these powers.[2]

It was the well-settled rule at common law that courts had full control over their judgments until the end of the term at which they were rendered; that until the end of the

[1] *Ante* sec. 27; Fox *v.* Meachim, 6 Neb. 530; Brown *v.* Goble, 97 Ind. 86.

[2] Brown *v* Kalamazoo Circuit Judge, 42 N. W. Rep. 827.

term the proceedings, although closed in fact, were treated as being *in fiere* and the judgment rendered, although final in form, as not being final until the close of the term. Therefore the court had full jurisdiction, during the term, to grant a new trial or modify or vacate the judgment on its own motion or on the application of a party.[1]

But when the term closed the judgment became final and the court lost all power and control over it and could neither grant a new trial nor modify nor vacate the judgment for errors of law in the proceedings, except upon the commencement of such proceedings as would give it jurisdiction anew.[2] And it is held in the federal courts that this can not be done by motion and service of notice upon the attorney who acted as such for the party proceeded against, pending the action, on the ground that the power of the attorney to bind his client must be held to have ceased with the final judgment unless the contrary is shown.[3]

In order to give the court jurisdiction in such cases, notice of the application, in whatever form it may be made, is necessary.[4] Notice may be served out of the state.[5] Notice may be waived by appearance or otherwise, as in other cases.[6] And the requirement that the judgment must be vacated during the term may be waived by consent of parties, and upon such consent the judgment may be set aside and a new trial granted at a subsequent time.[7]

[1] Freeman on Judg., sec. 90; 1 Black on Judg., sec. 305; Wiggin *v.* Superior Court, 68 Cal. 398; 9 Pac. Rep. 646; Rottman *v.* Schmucker, 94 Mo. 139; 7 S. W. Rep. 117; Kelty *v.* High, 29 W. Va. 381; 1 S. E. Rep. 561; Bronson *v.* Schulten, 104 U. S. 410.

[2] Freeman on Judg., secs. 96, 103; 1 Black on Judg., sec. 306; Wiggin *v.* Superior Court, 68 Cal. 398; 9 Pac. Rep. 646; Central Trust Co. *v.* Grant Locomotive Works, 135 U. S. 207; 10 Sup. Ct. Rep. 736; United States *v.* Wallace. 46 Fed. Rep. 569; Grames *v.* Hawley, 50 Fed. Rep. 319; Spafford *v.* City of Janesville, 15 Wis. 474; Alabama, etc., Ry. Co. *v.* Bolding, 69 Miss. 255; 13 Sou. Rep. 844.

[3] Grames *v.* Hawley, 50 Fed. Rep. 319.

[4] Freeman on Judg., sec. 103; Vallejo *v.* Green, 16 Cal. 161; Reilly *v.* Ruddock, 41 Cal. 312; Hettrick *v.* Wilson, 12 Ohio St. 136; 80 Am. Dec. 337; Nuckolls *v.* Irwin, 2 Neb. 60.

[5] Darrence *v.* Preston, 18 Ia. 396.

[6] Acock *v.* Halsey, 90 Cal. 215; 27 Pac. Rep. 193.

[7] Gage *v.* City of Chicago, 141 Ill. 642; 31 N. E. Rep. 163.

Conforming to the common law rule it is provided in most of the statutes on the subject that proceedings for a new trial, or for the vacation of judgments, must be commenced during the term at which the judgment is rendered.[1] And where there is no statute on the subject the rule is the same as at common law.[2] But this is not so in all of the states. In some there are no terms of court, and in those states a definite time is fixed within which the proceedings must be instituted.[3]

If the application is based upon some cause not within the statute limiting the time it must be made within a reasonable time.[4] And whether the time is limited to the term or to some other fixed time, the limitation is one by which the parties and courts are bound, and in order to give the court jurisdiction to proceed, the necessary steps must be taken within the time limited.[5] But if the motion is made in time the failure of the court to act upon it will not deprive the party of his rights except where it is required by statute that the motion shall be acted upon, as well as submitted or filed, within a limited time.[6]

A different rule prevails, however, in some of the states,[7]

[1] 1 Black on Judg., sec. 306; Campbell *v.* Conover, 26 Ill. 64; Krutz *v.* Craig, 53 Ind. 561; Beals *v.* Beals, 20 Ind. 163; Ex parte Holmes, 21 Neb. 324; 32 N. W. Rep. 69; Palatka & I. R. Ry. Co. *v.* State, 23 Fla. 546; 3 Sou. Rep. 158.

[2] Rottman *v.* Schmucker, 94 Mo. 139; 7 S. W. Rep. 117.

[3] Wiggin *v.* Superior Court, 68 Cal. 398; 9 Pac. Rep. 646.

[4] Wiggin *v.* Superior Court, 68 Cal. 398; 9 Pac. Rep. 646; Norton *v.* Atchison, etc., R. R. Co., 97 Cal. 388; 30 Pac. Rep. 585; 32 Pac. Rep. 452; Langans Estate, 74 Cal. 353; 16 Pac. Rep. 188.

[5] *Ante*, sec. 27; Fox *v.* Meacham, 6 Neb. 530; Moore *v.* Superior Court, 86 Cal. 495; 25 Pac. Rep. 22; Bell *v.* Thompson, 19 Cal. 707; Wallace *v.* Center, 67 Cal. 133; 7 Pac. Rep. 441; People *v.* Harrison, 84 Cal. 607; 24 Pac. Rep. 311; Jacks *v.* Baldez, 97 Cal. 91; 31 Pac. Rep. 899; School District *v.* Chicago Lumber Co., 41 Kan. 618; 21 Pac. Rep. 599; Brown *v.* Goble, 97 Ind. 86; State *v.* Williams, 48 Ark. 227; 2 S. W. Rep. 843; Krutz *v.* Craig; 53 Ind. 561; Emison *v.* Shepard, 121 Ind. 184; 22 N. E. Rep. 883; Mattern *v.* Sage, 3 N. Y. Supl. 120; Schwartz *v.* Oppenheimer, 90 Ala. 462; 8 Sou. Rep. 36.

[6] Johnston *v.* Simmons, 77 Ga. 298; 2 S. E. Rep. 469; Harris *v.* State, 24 Neb. 803; 40 N. W. Rep. 317; Niles *v.* Parks, 49 Ohio St. 370; 34 N. E. Rep. 735.

[7] City of Siloam Springs *v.* McPhitridge, 53 Ark. 21; 13 S. W. Rep. 137.

and of course a statute requiring that the motion shall be heard, as well as made, during the term is binding, and the motion can not be heard thereafter.[1] But the contrary has been held on the ground that the statute, so far as it requires action by the court within a specified time, is merely directory.[2]

If a court acts after the time limited, it is without jurisdiction and its proceedings are void.[3] There are cases, however, which hold the making of the motion for a new trial at a subsequent term to be a mere irregularity.[4]

The time can not be extended by the court unless authority therefor is given by the statute, and then it must be given within the time and in the manner provided by law.[5] But time may be given with the consent of parties,[6] or the parties may extend it by stipulation,[7] even after the time allowed by law has expired before the stipulation is made.[8]

But the inherent power by which courts may protect their jurisdiction by relieving a party from the fraud of his adversary, or his own mistake or inadvertence, extends to a failure to act in time in a matter of this kind, and upon a proper showing such relief may be granted and the party secured in his rights.[9]

There are statutory exceptions to the rule that the proceedings must be commenced within the time limited in order to give the court jurisdiction. These exceptions are

[1] Molair *v.* Port Royal, etc., Ry. Co., 31 S. Car. 510; 10 S. E. Rep. 243.

[2] Gomer *v.* Chaffee, 5 Colo. 383.

[3] State *v.* Williams, 48 Ark. 227; 2 S. W. Rep. 843; Thomson *v.* Thomson, 73 Wis. 84; 40 N. W. Rep. 671; State *v.* Walls, 113 Mo. 42; 20 S. W. Rep. 883; Burroughs *v.* Taylor, 17 S. E. Rep. 745; Greenup *v.* Crooks, 50 Ind. 410; Ex parte Holmes, 21 Neb. 324; 32 N. W. Rep. 69; Schwartz *v.* Oppenheimer, 90 Ala. 462; 8 Sou. Rep. 36.

[4] Larson *v.* Ross, 57 N. W. Rep. 323.

[5] Clark *v.* Crane, 57 Cal. 629; Krutz *v.* Craig, 53 Ind. 561; Cutsinger *v* Nebeker, 58 Ind. 401.

[6] Cutsinger *v.* Nebeker, 58 Ind. 401.

[7] East *v.* Mooney, 7 Utah, 414; 27 Pac. Rep. 4; Simpson *v.* Budd, 91 Cal. 488; 27 Pac. Rep. 758.

[8] Simpson *v.* Budd, 91 Cal. 488; 27 Pac. Rep. 758.

[9] Thomas *v.* Morris, 8 Utah, 284; 31 Pac. Rep. 446.

usually made in cases of fraud, mistake or excusable neglect, which should entitle the party to relief, irrespective of the time fixed. In such cases a longer time is usually given.[1] And independently of such statutory exceptions, and in spite of statutory limitations, courts have the inherent power to set aside their judgments and grant the injured party relief, on the ground of fraud in obtaining them, by the opposite party, or for other reasons which would render the enforcement of the judgment unconscionable.[2] So courts have inherent power to open up their judgments, in furtherance of justice, for other causes than those of fraud or mistake; for example, for the purpose of letting in new parties whose presence is necessary to the full determination of the matter in controversy.[3]

Some of the cases go so far as to hold that the limitation as to time does not deprive the courts of their inherent power to relieve a party from a judgment rendered against him and that this may be done after the time limited, notwithstanding the statute.[4]

But it is believed that such a doctrine can not be sustained. It is certainly a reasonable regulation of the exercise of the inherent power of the courts, in this class of cases, to provide that the relief shall be asked for and granted within a time limited, so long as the limitation as to the length of time is a reasonable one. There is no difference in principle, and should be none in practice in this respect, between a motion for a new trial and a motion or other proceeding to vacate a judgment. And it is uniformly held that statutes limiting the time within which motions for new trials shall be made are binding on the courts, as has been shown above. But this is subject, as above stated, to the rule that such limitations do not ap-

[1] 1 Black on Judg., sec. 311; Freeman on Judg., sec. 105; In re Pedrorena, 22 Pac. Rep. 71; Hass *v.* Billings, 42 Minn. 63; 43 N. W. Rep. 797; Thomas *v.* Morris, 8 Utah, 284; 31 Pac. Rep. 446.

[2] Norton *v.* Atchison, etc., R. R. Co., 97 Cal. 388; 30 Pac. Rep. 585; 32 Pac. Rep. 452.

[3] Ladd *v.* Stevenson, 112 N. Y. 325; 19 N. E. Rep. 842.

[4] Kieffer *v.* Grand Trunk Ry. Co., 8 N. Y. Supl. 230.

ply, and are not generally intended to apply, to causes affecting the validity of the judgment.

In some of the states, it is provided that applications to vacate judgments shall be made not only during the term, but within a certain number of days after the judgment is rendered, which may terminate the time before the expiration of the term. This brings the statute in conflict with the rule that courts have full control over their judgments until the close of the term. It has been held under such circumstances that the action of the court in granting or refusing a new trial during the term may be regarded as an exercise of the general powers of the court and be upheld, in the absence of a showing to the contrary or that there was an abuse of such general power and control over its judgments, notwithstanding the proceeding was not instituted within the time limited by the statute.[1]

But there is no apparent reason why the legislature may not limit the time for making the application in the manner mentioned, so far as it may control the inherent power of the court at all. If the time is a reasonable one, it is a reasonable limitation of the existing power of the court to control and modify, or set aside, its judgments.[2]

[1] Nelson *v.* Ghiselin, 17 Mo. App. 663; Fannon *v.* Plummer, 30 Mo. App. 25.

[2] The court of appeals of Missouri, in discussing the question, uses this language: "The appellant now claims, as he claimed in the court below, that after the lapse of four days subsequent to the rendition of the judgment of affirmance, the trial court lost jurisdiction to vacate the judgment, either upon the defendant's motion or its own, and that all its subsequent proceedings were illegal; while the defendant claims that, although he had no legal right to have his motion considered, the court had the legal power to consider it at any time during the term, and to vacate any judgment rendered by it during the term when such judgment was rendered, either upon the defendant's suggestion or upon its own motion.

"We believe that neither the plaintiff's nor the defendant's position can be sustained to the full extent claimed. Mr. Freeman, in his work on Judgments, states the proposition thus: 'The power to vacate judgments was conceded by the common law to all its courts. This power was exercised in a great variety of circumstances, and subject to various restraints. The practice in the different states is in many respects so

There is no good reason for holding that a judgment may not be made final by statute at an earlier time than the close of the term.

conflicting, that few rules can be laid down universally applicable. One rule, however, is undoubted; that is, that the power of the court over its judgments, during the entire term at which they are rendered, is unlimited.' Freem. on Judg., sec. 90. An examination of the cases relied upon by the author in support of this text fails to support it.

"The power of trial courts to vacate their own judgments during the term, we conceive is not, and never has been, absolute, but even where not limited by statute, has always been dependent on good cause existing or shown. Were the rule otherwise, the plaintiff in a case like the one before us could be deprived by the trial court of all redress. He could obtain a number of successive affirmances of his judgment before the justice, which might be successively vacated by the circuit court, during the term when rendered, and yet the action of the trial court in thus vacating them would not be subject to review on appeal. Where the statute provides that the court may, upon motion filed within a certain time, vacate its judgment, the discretion of the trial court in thus vacating its judgment is not subject to review on appeal, or in any other manner. It may therefore properly be said that the power of the trial court in the case last above stated to vacate its judgment within the term is absolute. Helm *v.* Bassett, 9 Mo. 52; Keating *v.* Bradford, 25 Mo. 87. On the other hand, the common law power of the trial court to vacate its own judgment, during the term when rendered, in the absence of a statutory limitation, has always been recognized, *sub modo*, in this state. William *v.* Circuit Court, 5 Mo. 248; Richmond *v.* Wardlaw, 36 Mo. 313; Simpson *v.* Blunt, 42 Mo. 544; State ex rel. *v.* Adams, Supr. Court, Oct. Term, 1884.

"In view of the statutory and decided law and the prevailing practice of the courts on this subject, we are inclined to state the rule thus: Where the trial court, during the term when a judgment is rendered, vacates it, its action in so doing must, in the absence of a showing to the contrary, be considered warranted by the exercise of its general power. Its action, however, is subject to review by the appellate court by *mandamus* or appeal, as the case may be. The party seeking such review must affirmatively show that the action of the trial court in thus vacating its judgment was either illegal, because in contravention of some statute, or else that it should be set aside because oppressively exercised. If he fails to show one or the other, the action of the court must stand." Nelson *v.* Ghiselin, 17 Mo. App. 664.

The language used is not very clear, nor is the rule laid down easily understood. The case seems to take a kind of half-way ground between the doctrine that the power of the courts over their judgments is absolute, until the close of the term, and what it is believed is the better rule, that the power is subject to reasonable statutory limitation as to the time of its exercise, even during the term.

An appeal does not deprive a court of the power over its judgment during the term.[1]

Statutes of the kind under consideration are limitations not only upon the time when such applications shall be made, but upon the grounds upon which judgments may be set aside or new trials granted. Therefore, a court has no power to set aside its own judgments after the term except upon the grounds mentioned in the statute.[2] It has no more control over its judgments after the term, independently of some statute giving it such power, than any other court has. The judgment may be set aside in such court upon sufficient grounds, the same as it may be set aside in any other court of competent jurisdiction, but not otherwise. In other words, it has no special control or power over the judgment merely because it is its own judgment. There are exceptions to this rule, however, growing out of the nature of certain classes of judgments over which a court has a continuing control with power to modify or change them without limitation as to time; for example, judgments for the custody of children, guardianship of minors and lunatics, for alimony, and the like. In such cases, the court may, without statutory authority, modify or set aside its judgments after the term.[3]

The limitation of a statute of this kind is held not to apply to a case where a return of service is made as being upon an agent who was not such, and judgment taken by default upon such return upon the ground that in such case the court has been deceived by a false return and the defendant is without fault and that the objection can be made by motion in the court rendering the judgment.[4] But this is opposed to the well-settled rule that only such judg-

[1] Blackburn *v.* Knight, 16 S. W. Rep. 1075.

[2] McBrien *v.* Riley, 57 N. W. Rep. 385; Kohn *v.* Haas, 12 Sou. Rep. 577.

[3] Dutcher *v.* Hill, 29 Mo. 271; 77 Am. Dec. 572; In re Maryins, 85 Mo. 615.

[4] Norton *v.* Atchison, etc., R. R. Co., 97 Cal. 388; 30 Pac. Rep. 585; 32 Pac. Rep. 452.

ments as are void on their face can be set aside on mere motion.[1] It involves the determination of the question of fact upon evidence outside of the record and against the return of the officer, whether the person served was the agent of the corporation and properly served, which can not, as we shall see further on in this section, be done upon a motion to vacate the judgment, whether the return of service as upon the agent be treated as a fraud or not. The question could properly be presented upon a motion to set the default aside, or by action, but not otherwise.[2]

These limitations apply only to erroneous judgments, and not to such as are void. Such, though judgments in form, are not judgments at all, and this may be shown and the party relieved from them at any time or in any form, in the court in which the judgment was rendered or in any other court.[3]

But this is not so, necessarily, where the invalidity of the judgment is not apparent upon the face of the record, but can be made to appear so only by extraneous evidence. In such cases, although the courts have the power, independent of statutes, to give relief, the power does not rest upon the authority of a court to control its own judgments which ceases with the term, and the legislature has the undoubted right to provide that in order to obtain relief the party shall apply therefor within a limited time,

[1] Jacks *v.* Baldez, 97 Cal. 91; 31 Pac. Rep. 899; Kohn *v.* Haas, 12 Sou. Rep. 577; Clarke Cove Guano Co. *v.* Steed, 17 S. E. Rep. 967.

[2] Syme *v.* Trice, 96 N. Car. 243; 1 S. E. Rep. 480.

[3] *Ante*, secs. 22, 23, 25; 1 Black on Judg., sec. 307; Wallace *v.* Center, 67 Cal. 133; 7 Pac. Rep. 441; People *v.* Harrison, 84 Cal. 607; 24 Pac. Rep. 311; Kreiss *v.* Hotaling, 96 Cal. 617; 31 Pac. Rep. 740; Jacks *v.* Baldez, 97 Cal. 91; 31 Pac. Rep. 899; People *v.* Greene, 74 Cal. 400; 16 Pac. Rep. 197; Wilson *v.* Hawthorn, 14 Colo. 530; 24 Pac. Rep. 548; Remer *v.* Mackay, 35 Fed. Rep. 86; Underhills Est., 9 N. Y. Supl. 457; United States *v.* Wallace, 46 Fed. Rep. 569; Pantall *v.* Dickey, 123 Pa. St. 431; 16 Atl. Rep. 789; Bannon *v.* Rohmeiser, 9 S. W. Rep. 293; Thomas *v.* American, etc., Co., 47 Fed. Rep. 550.

and that the application shall be made in a particular manner.[1]

The right to a new trial must, with the exceptions above pointed out, be confined to the grounds specified in the statute, and such new trial can only be granted upon the grounds so specified and made the basis of the motion. Not only is the statute a limitation upon the jurisdiction of the court, but the motion or notice of motion stating the grounds for relief must confine the court to the grounds stated. And, independently of any limitation imposed by statute, a party may lose his right to the interposition of a court of equity for relief by delay in making his application.[2]

It is frequently said that courts of equity will not grant new trials or vacate judgments, but will only act upon the parties and prevent them from receiving the benefits of their judgments and thereby compel them to consent to a new trial.[3]

This is true as to what courts of equity will not do as a rule. But as a statement of what courts of equity may properly do, or of what they have jurisdiction to do, it is not true. Courts of equity have power to order new trials in courts of law,[4] and to vacate the judgments of such courts on grounds falling within equitable cognizance, as, for example, in cases of fraud, mistake, and like causes, and in case of newly discovered evidence.[5] And that, too, although the judgment may have been rendered by a court of superior jurisdiction to the court of chancery

[1] People *v.* Green, 74 Cal. 400; 16 Pac. Rep. 197; People *v.* Harrison, 84 Cal. 607; 24 Pac. Rep. 311.

[2] Earle *v.* Earle, 91 Ind. 27.

[3] Freeman on Judg., sec. 484a; 1 Black on Judg., sec. 357; Martin *v.* Parsons, 49 Cal. 94.

[4] Freeman on Judg., sec. 484a; Horn *v.* Queen, 4 Neb. 108; Brown *v.* Luehrs, 95 Ill. 195; Deputy *v.* Tobias, 1 Blkf. (Ind.) 311; 12 Am. Dec. 243; Story Eq. Pl., sec. 426; District Township *v.* White, 42 Ia. 608; Bond *v.* Epley, 48 Ia. 600.

[5] Freeman on Judg., secs. 484a, 485, 486, 488–494; Horn *v.* Queen, 4 Neb. 108; Dringer *v.* Receiver of Erie Ry. Co., 42 N. J. Eq. 573; 8 Atl. Rep. 811; Buckelew *v.* Chipman, 5 Cal. 399; Nealis *v.* Dicks, 72 Ind. 374; Oliver *v.* Pray, 4 Ohio, 175; 19 Am. Dec. 595; Brown *v.* Luehrs, 95 Ill.

before whom the proceeding to vacate and annul it is brought.[1] But it is a power that is not frequently used in that direct way. It is held under the codes, however, that one court of concurrent jurisdiction has no power to vacate or set aside the judgments of another court.[2]

So far as the rule applies to the vacation or opening up of judgments by mere motion, this is undoubtedly true. But it is not the correct rule when applied to an independent action to vacate or set aside a judgment such as might have been brought in a court of equity, as such, as shown above, against the judgment of any court, high or low. There is nothing in the consolidation of common law and equity jurisdiction in the same courts which can reasonably be regarded as changing the rule. Therefore there is no apparent reason for holding that an independent action to vacate a final judgment can not be maintained in any court of competent jurisdiction irrespective of the fact of the judgment having been rendered by another court of concurrent jurisdiction, where there is no statutory provision against it. But this can not be so where the action is still pending in the court first taking jurisdiction. So long as the action is pending the jurisdiction is exclusive.[3] And if the party has an adequate remedy by motion in the court in which the judgment was rendered that is a sufficient reason for a refusal to entertain an action, in the nature of a suit in equity, to vacate the judgment.[4] But this limitation of the right or disposition of a court to act was equally applicable to courts of chancery and does not rest upon a want of jurisdiction of one court to interfere with the judgments of another court of

195; Dady *v.* Brown, 76 Ia. 528; 41 N. W. Rep. 209; Herbert *v.* Herbert, 47 N. J. Eq. 11; 20 Atl. Rep. 290; Tomlinson *v.* Litze, 82 Ia. 32; 47 N. W. Rep. 1015; Doughty *v.* Doughty, 27 N. J. Eq. 315; Link *v.* Link, 48 Mo. 345.

[1] Dringer *v.* Receiver of Erie Ry. Co., 42 N. J. Eq. 573; 8 Atl. Rep. 811.

[2] Cardinal *v.* Eau Claire Lumber Co., 75 Wis. 404; 44 N. W. Rep. 761.

[3] *Ante*, secs. 17, 79, p. 608.

[4] Coon *v.* Seymour, 71 Wis. 340; 37 N. W. Rep. 243.

concurrent jurisdiction by way of a proceeding of this kind.[1]

The federal courts have jurisdiction to set aside the judgments of state courts for fraud where the amount involved, and the citizenship of the parties, vests them with jurisdiction in the particular case.[2] The power of a court of equity extends also to cases where judgment has been rendered against a party without notice.[3]

It is a power that is exerted less frequently at the present day than it was formerly because the common law courts are, as a rule, given full power, under statutory provisions, to grant such relief as adequately as it can be administered by courts of chancery.[4] But the jurisdiction may still be exercised in a proper case where, from no fault of the complaining party, the common law court has no power to grant the relief.[5]

It is generally held that statutory or code provisions authorizing the review or vacation of judgments, and specifying the grounds upon which such relief may be had, do not take away from the courts the general equity jurisdiction existing in them to vacate and annul such judgments.[6]

[1] But see on this subject, State *v.* King, 43 La. Ann. 826; 9 Sou. Rep. 640.

[2] Young *v.* Sigler, 48 Fed. Rep. 182.

[3] Brown *v.* Goble, 97 Ind. 86; Remer *v.* Mackay, 35 Fed. Rep. 86.

[4] Horn *v.* Queen, 4 Neb. 108; Powers *v.* Butler, 4 N. J. Eq. 465; Hass *v.* Billings, 42 Minn. 63; 43 N. W. Rep. 797.

[5] Horn *v.* Queen, 4 Neb. 108; Brown *v.* Goble, 97 Ind. 86.

[6] Nealis *v.* Dicks, 72 Ind. 374; Earle *v.* Earle, 91 Ind. 27.

"That our courts possess ample equity powers is a proposition so plainly correct that its bare statement excludes debate. Nor does the statute concerning the review of judgments restrict the power of the courts to set aside judgments to the two grounds there specified. Courts must, and do, possess other powers than those expressly conferred by statute. The code does not profess to strip the courts of the powers incident to courts of equity. The framers of the code did not intend to take from our courts rights and authority long asserted and exercised. Courts of equity possess powers far more important and infinitely more essential to the complete administration of justice than any ever created or conferred by legislative enactment. The powers of courts of equity were created and defined by men of wisdom, whose object was

The power, in whatever way it may be exercised, does not extend to the mere correction of errors or irregularities. Relief for such causes must be sought by appropriate proceedings in the court in which the judgment was rendered or by appeal.[1]

Courts of chancery, in granting such relief, proceed upon purely equitable grounds. Therefore they will not set aside a judgment because it is void, unless it also appears that it is inequitable.[2]

The fraud which will authorize the vacation of a judgment must be a fraud extrinsic, or collateral, to the questions examined and determined in the action, and by which the party was prevented from properly presenting his case.[3]

to form a body of primary rights and equitable remedies that would enable the courts to enforce the principles of natural justice. It will not do to hold that courts possess no power to annul judgments except upon the grounds and in the mode expressly specified and prescribed by statute. If courts were restricted to the exercise of mere statutory powers, they would make but a lame and halting progress in the administration of justice. The statute concerning the review of judgments does not mean that judgments shall only be vacated upon the grounds therein designated, or only in the mode there prescribed, to the exclusion of all other causes and all other modes. Neither the letter nor the spirit of the act warrants the conclusion that the legislature intended to so narrow the power of courts of general jurisdiction to relieve against judgments, as to limit and confine them to the causes and modes expressly prescribed by statute. Where the statute does prescribe the causes for which a judgment may be set aside, and does provide a mode of procedure, then, of course, the statute controls, and is to be followed and obeyed." Nealis *v.* Dicks, 72 Ind. 374, 376.

[1] *Ante*, sec. 79; Freeman on Judg., secs. 487, 488, 489; In re Griffith, 84 Cal. 107; 23 Pac. Rep. 528; 24 Pac. Rep. 381; Putnam *v.* Webb, 15 Ore. 440; 15 Pac. Rep. 711; Thomas *v.* West, 59 Wis. 103; 17 N. W. Rep. 684; Boulton *v.* Admistrators of Scott, 3 N. J. Eq. 231; Reeves *v.* Cooper, 12 N. J. Eq. 223; Vaughn *v.* Johnson, 9 N. J. Eq. 173; Tompkins *v.* Tompkins, 11 N. J. Eq. 512; Stratton *v.* Allen, 16 N. J. Eq. 229.

[2] Thomas *v.* West, 59 Wis. 103; 17 N. W. Rep. 684.

[3] United States *v.* Throckmorton, 98 U. S. 61; Pico *v.* Cohn, 91 Cal. 129; 25 Pac. Rep. 970; In re Griffith, 84 Cal. 107; 23 Pac. Rep. 528; 24 Pac. Rep. 381; Richardson *v.* Stowe, 102 Mo. 33; 14 S. W. Rep. 810; Irvine *v.* Leyh, 102 Mo. 200; 14 S. W. Rep. 715; Stratton *v.* Allen, 16 N. J. Eq. 229.

"There are no maxims of the law more firmly established, or of more value in the administration of justice, than the two which are

Therefore the fact that the judgment was procured by perjury on behalf of, or by, the prevailing party, or by

designed to prevent repeated litigation between the same parties in regard to the same subject of controversy, namely, *interest rei publicae, ut sit finis litium,* and *nemo debit bis vexari pro una et eadam causa.*

"If the court has been mistaken in the law, there is a remedy by writ of error. If the jury has been mistaken in the facts, the remedy is by motion for new trial. If there has been evidence discovered since the trial, a motion for a new trial will give appropriate relief. But all these are parts of the same proceeding, relief is given in the same suit, and the party is not vexed by another suit for the same matter. So in a suit in chancery, on proper showing a rehearing is granted. If the injury complained of is an erroneous decision, an appeal to a higher court gives opportunity to correct the error. If new evidence is discovered after the decree has become final, a bill of review on that ground may be filed within the rules prescribed by law on that subject. Here, again, these proceedings are all part of the same suit, and the rule framed for the repose of society is not violated.

"But there is an admitted exception to this general rule in cases where by reason of something done by the successful party to a suit, there was in fact no adversary trial or decision of the issue in the case. Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side; these and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and a fair hearing. See Wells *Res Adjudicata*, sec. 499; Pearce *v.* Olney, 20 Conn. 544; Wierich *v.* De Zoya, 7 Ill. 385; Kent *v.* Ricards, 3 Md. Ch. 392; Smith *v.* Lowry, 1 Johns. (N. Y.) Ch. 320; De Louis et al. *v.* Meeks et al., 2 Iowa, 55.

"In all these cases, and many others which have been examined, relief has been granted on the ground that by some fraud practiced directly upon the party seeking relief against the judgment or decree, that party has been prevented from presenting all of his case to the court.

"On the other hand, the doctrine is equally well settled that the court will not set aside a judgment because it was founded on a fraudulent instrument or perjured evidence, or for any matter which was actually presented and considered in the judgment assailed." United States *v.* Throckmorton, 98 U. S. 61, 65.

"In all such instances the unsuccessful party is really prevented by

false or forged documentary evidence, is not ground for such relief, if the party has had an opportunity to show that the testimony was false or the instrument was forged, for the reason that the truth or falsity of the evidence was passed upon by the court upon the trial and the question can not be retried by a motion or action to vacate the judgment.[1]

A different rule has been declared, however, in some of the cases;[2] and in some of the states statutes have been enacted authorizing the vacation of judgments by an action brought for that purpose on the ground that the same have been procured by perjury or subornation of perjury as well as for other fraudulent acts.[3] But such statutes are given a strict construction, on the ground that they are in derogation of the common law, and for the further reason urged against applying such relief, independently

the fraudulent contrivance of his adversary from having a trial; but when he has a trial he must be prepared to meet and expose perjury then and there. He knows that a false claim or defense can be supported in no other way; that the very object of the trial is, if possible, to ascertain the truth from the conflict of the evidence, and that necessarily the truth or falsity of the testimony must be determined in deciding the issue. The trial is his opportunity for making the truth appear. If, unfortunately, he fails, being overborne by perjured testimony, and if he likewise fails to show the injustice that has been done him, on motion for a new trial, and the judgment is affirmed on appeal, he is without remedy. The wrong, in such case, is, of course, a most grievous one, and no doubt the legislature and the courts would be glad to redress it if a rule could be devised that would remedy the evil without producing mischiefs far worse than the evil to be remedied. Endless litigation, in which nothing was ever finally determined, would be worse than occasional miscarriages of justice; and so the rule is that a final judgment can not be annulled merely because it can be shown to have been based on perjured testimony; for, if this could be done once, it could be done again and again, *ad infinitum*." Pico *v.* Cohn, 91 Cal. 129, 134; 25 Pac. Rep. 970. See on this point, Doughty *v.* Doughty, 27 N. J. Eq. 315, in which a broader power is apparently maintained for courts of chancery under such circumstances.

[1] Pico *v.* Cohn, 91 Cal. 129; 25 Pac. Rep. 970; Dringer *v.* Receiver of Erie Ry. Co., 42 N. J. Eq. 573; 8 Atl. Rep. 811; Cotzhausen *v.* Kerting, 29 Fed. Rep. 821.

[2] Laithe *v.* McDonald, 7 Kan. 254; 12 Kan. 340.

[3] Hass *v.* Billings, 42 Minn. 63; 43 N. W. Rep. 797.

of statutory provisions on the subject, viz., the tendency to prolong litigation.[1]

As in other cases a court of equity will not interfere to vacate a judgment where the party has an adequate remedy in the court in which the judgment was rendered, by motion, or otherwise.[2]

Whatever proceeding may be resorted to to vacate a judgment, it can not be used to retry the questions of law or fact submitted to the court and determined in the action.[3]

The appropriate proceedings to set aside a decree in equity is by way of a bill of review.[4] This remedy has been abolished in some of the states; but where the remedy in that form is taken away an original suit for the purpose, and upon like grounds, may be prosecuted.[5] Such a proceeding is provided for by statute in some of the states,[6] and the right to annul a void judgment, under the codes, by an action brought for that purpose, is maintained.[7]

A new trial may be granted as to a part of the issues in a cause,[8] but this must not be understood as allowing a new trial upon one or any number of findings of *fact* not constituting an issue upon a separate and distinct cause of action or defense.[9]

[1] Stewart *v.* Duncan, 40 Minn. 410; 42 N. W. Rep. 89; Hass *v.* Billings, 42 Minn. 63; 43 N. W. Rep. 797.

[2] Coon *v.* Seymour, 71 Wis. 340; 37 N. W. Rep. 243.

[3] Richardson *v.* Stowe, 102 Mo. 33; 14 S. W. Rep. 810.

[4] Freeman on Judg., sec. 484a; 1 Black on Judg., sec. 301; Sheffield *v.* Mullen, 28 Minn. 251; 9 N. W. Rep. 756.

[5] Crews *v.* Richards, 14 Or. 442; 13 Pac. Rep. 67.

[6] Mulvaney *v.* Lovejoy, 37 Kan. 305; 15 Pac. Rep. 181; Roush *v.* Leyton, 51 Ind. 106.

[7] Willman *v.* Willman, 57 Ind. 500.

[8] San Diego Land & Town Co. *v.* Neale, 78 Cal. 63; 20 Pac. Rep. 372; Lake *v.* Lake, 18 Nev. 361; 4 Pac. Rep. 711.

[9] The case of Land & Town Co. *v.* Neale, *supra*, carries the rule that a new trial may be granted as to a part of the issues too far. The case was one for the condemnation of land which involved two questions, viz., whether the land sought to be condemned was necessary for a public use, and if so what was its value. The plaintiff having obtained a judgment as to the first of these questions and not being satisfied as to the amount of damages allowed moved for a new trial, not as to the whole case, but only as to the amount of damages. These were not two sepa-

The mode usually resorted to at the present day for relief from a judgment, other than by a motion for a new trial, is by a motion, upon notice, in the court in which judgment was rendered.[1]

This was a common-law remedy, and was very rarely allowed after the term at which the judgment was rendered.[2]

If the attack upon the judgment is upon the ground of irregularity, or that it is voidable only, or where there is a want of jurisdiction of the person not appearing on the face of the record, it is held in some of the states that relief can not be obtained by action in another court;[3] but where the ground is want of service of summons on the defendant it is held that the writ of *recordari* which is preserved by the codes of some of the states may be resorted to.[4]

It is further held that if the judgment is sought to be vacated on the ground of fraud it can not be done by motion in the cause, but only by an independent action.[5]

The same rule should be enforced in every proceeding for the vacation of a judgment involving the investiga-

rate and distinct issues, in the proper sense of the term, but were each a part of the same cause of action, necessary to be determined under one paragraph or count of the complaint. Two *facts* to be determined under one issue rather than two separate and distinct issues. The new trial in this case was allowed solely to determine the *amount* of damages the defendant should recover leaving the judgment condemning the land, the right to which was really the only issue in the cause, to stand in favor of the plaintiff.

[1] In re Pedrorena, 22 Pac. Rep. 71; Sheffield *v.* Mullen, 28 Minn. 251; 9 N. W. Rep. 756; Syme *v.* Trice, 96 N. Car. 243; 1 S. E. Rep. 480; Beach *v.* Beach, 6 Dak. 371; 43 N. W. Rep. 701; First Nat'l Bank *v.* Grimes, 45 Kan. 510; 26 Pac. Rep. 56; Gallop *v.* Allen, 113 N. Car. 24; 18 S. E. Rep. 55; 12 Am. & Eng. Enc. of Law, 132.

[2] Kemp *v.* Cook, 18 Md. 130; 79 Am. Dec. 681.

[3] Whitehurst *v.* Merchants, etc., Transp. Co., 109 N. Car. 342; 13 S. E. Rep. 937; Gallop *v.* Allen, 113 N. Car. 24; 18 S. E. Rep. 55.

[4] King *v.* Wilmington & W. R. Co., 112 N. Car. 318; 16 S. E. Rep. 929; Gallop *v.* Allen, 113 N. Car. 24; 18 S. E. Rep. 55.

[5] Estes *v.* Jackson, 111 N. Car. 145; 16 S. E. Rep. 7; Sharp *v.* Danville, etc., R. Co., 106 N. Car. 308; 11 S. E. Rep. 530.

tion and decision upon questions of fact, not appearing upon the face of the record. So it is held under some of the codes that the remedy by motion can only be resorted to where the invalidity of the judgment is apparent on the face of the record.[1]

The remedy is not one for the correction of mere errors, after the close of the term. This can only be done by motion for a new trial, in the court in which the judgment was rendered, or by appeal or writ of error.[2]

The writ of error *coram nobis* was a common-law writ for the correction of mistakes not put in issue or passed upon, or where there was error in the process through the fault of the clerk.[3] But the writ has been superseded almost entirely in modern practice by motion to be made to the court rendering the judgment, or by action.[4]

The common-law writ of *recordari*, which was used as a substitute for an appeal lost without fault of the party, or as a writ of false judgment when the court was without jurisdiction, is practically unknown and wholly out of use in most of the states. The remedy by motion is held to be a direct attack upon the judgment. But in some of the states it is held that the remedy by motion, after a final determination of the action, must be confined to irregularities, and that where the judgment is attacked for fraud it must be by a new action.[5]

This, of course, is subject to the rule that judgments void on their face may be vacated on motion under most statutes; and where the question is one of jurisdiction of the person involving the question of notice, an independent action by complaint is an appropriate mode of bringing the same before the court.[6]

An order vacating a judgment is not generally review-

[1] Jacks *v.* Baldez, 97 Cal. 91; 31 Pac. Rep. 899; Kohn *v.* Haas, 12 Sou Rep. 577; Clarke Cove Guano Co. *v.* Steed, 17 S. E. Rep. 967.

[2] Salter *v.* Hilgan, 40 Wis. 363; Landon *v.* Burke, 33 Wis. 452.

[3] *Post*, sec. 85; Bronson *v.* Schultz, 104 U. S. 410.

[4] Bronson *v.* Schulten, 104 U. S. 410.

[5] Syme *v.* Trice, 96 N. Car. 243; 1 S. E. Rep. 480.

[6] Scudder *v.* Jones, 32 N. E. Rep. 221.

able by the court making the order;[1] but this must be subject to the right of a court to set aside or vacate its orders during the term.

Motions for new trials must be made to the court before which the action was tried,[2] and a motion, whether for a new trial or for a vacation of a judgment, must be made in the county or district in which the judgment was rendered.[3]

So an action brought to annul or enjoin the enforcement of a judgment is usually required to be brought in the county or district where the judgment was rendered.[4]

In the federal courts, it is held that a motion for a new trial is addressed to the discretion of the court, and that its decision thereon is not the proper subject of a bill of exceptions, or subject to re-examination in a court of errors.[5]

It is frequently said that such a motion is addressed to the discretion of the court;[6] but it does not follow, by any means, that where the judgment is the result, or may have resulted, from some error of the court, its action is not subject to review. The contrary is uniformly held. But the exception, under the practice in most of the states, and in the federal courts, must be to the ruling claimed to be erroneous, and not to the action of the court in ruling upon the motion. In some of the states, the exception goes directly to the ruling on the motion. But in either case it is a question of practice rather than of jurisdiction, except that an exception to the ruling on the motion, in-

[1] Hanson *v.* Hanson, 20 Pac. Rep. 736.

[2] Minkler *v.* Estate of Minkler, 14 Vt. 558.

[3] Godwin *v.* Monds, 101 N. Car. 354; 7 S. E. Rep. 793.

[4] Grattan *v.* Matteson, 51 Ia. 622.

[5] Coleman *v.* Bell, 4 N. Mex. 46; 12 Pac. Rep. 657; United States *v.* Buford, 3 Pet. 12; Brown *v.* Clarke, 4 How. 4; Life & Fire Ins. Co. *v.* Heirs of Wilson, 8 Pet. 291.

[6] Detroit Tug, etc., Co. *v.* Gartner, 75 Mich. 360; 42 N. W. Rep. 968; People *v.* Sutton, 73 Cal. 243; 15 Pac. Rep. 86; 16 Am. & Eng. Enc. of Law, 503, 516.

stead of the error complained of, may prevent an appellate court from passing upon the question.[1]

In some of the states, a new trial is allowed to the losing party as of right in certain cases.[2]

In such cases, the courts have no power to deny the new trial where the statute providing the terms upon which it shall be had has been complied with.[3]

The question whether a new trial can be had after the entry of judgment depends upon statutory provisions. At common law, and by the law of some of the states, a motion for a new trial can not be made after judgment;[4] but under most of the codes and statutes, the motion may be made within the time limited, whether the judgment has been entered or not.[5]

In some cases, a distinction is made between civil and criminal cases in this respect.[6]

Where the cause assigned is newly discovered evidence, or other cause discovered too late to present it earlier, an affirmance of the judgment by an appellate court is not a bar to the motion.[7]

85. WRITS OF ERROR.—Writs of error are of two kinds: *coram nobis*, which was returned to the court which rendered the judgment sought to be reviewed, with a view to the correction by that court of errors of fact affecting the validity and regularity of the proceedings and which were not brought into the issues; for example, such as the death of a party before judgment, or the legal disability of a party;[8] and *coram vobis*, which is made returnable before a

[1] Brown *v.* Clarke, 4 How. 4, 15.

[2] Lowe *v.* Foulke, 103 Ill. 58: Rodman *v.* Reynolds, 114 Ind. 148; 16 N. E. Rep. 516.

[3] Rodman *v.* Reynolds, 114 Ind. 148; 16 N. E. Rep. 516; Keener *v.* Union Pac. Ry. Co., 34 Fed. Rep. 871.

[4] Conklin *v.* Hinds, 16 Minn. 457.

[5] Beals *v.* Beals, 20 Ind. 163; Willis *v.* State, 62 Ind. 391.

[6] Willis *v.* State, 62 Ind. 391.

[7] Sheffield *v.* Mullen. 28 Minn. 251; 9 N. W. Rep. 756.

[8] *Ante*, sec. 84; 1 Black on Judg., sec. 300; Anderson's Dic. of Law, 260; 6 Am. & Eng. Enc. of Law, 810; Maple *v.* Havenhill, 37 Ill. App.

superior tribunal, and by which such superior court is authorized to review the record.[1]

The former is almost entirely out of use, having been superseded by remedies by motion in the court rendering the judgment.[2]

The writ of error now in use is a commission by which a court of superior jurisdiction is authorized to examine a record upon which a judgment has been given by an inferior court, and, on such examination, to affirm or reverse the same according to law.[3] It was formerly an original writ issuing out of a court of chancery.[4]

311; Dows *v.* Harper, 6 Ohio, 518; 27 Am. Dec. 270; Wynne *v.* Governor, 1 Yerger (Tenn.), 149; 24 Am. Dec. 448; Holford *v.* Alexander, 46 Am. Dec. 253, 257, note; Land *v.* Williams, 12 S. & M. (Miss.) 362; 51 Am. Dec. 117; Wheeler *v.* Winn, 91 Am. Dec. 193, note; Kemp *v.* Cook, 18 Md. 130; 79 Am. Dec. 681; Life Association *v.* Fassett, 102 Ill. 315; Bronson *v.* Schulten, 104 U. S. 410; Foster's Fed. Prac. 379; Dugan *v.* Scott, 37 Mo. App. 663.

[1] Freeman on Judg., sec. 94.

[2] Holford *v.* Alexander, 46 Am. Dec. 253, 257, note; McKinley *v.* Buck, 43 Ill. 488.

[3] Anderson's Dic. of Law, 412; Lynes *v.* State, 5 Porter (Ala.), 236; 30 Am. Dec. 557; Holford *v.* Alexander, 46 Am. Dec. 253, 257, note; Wheeler *v.* Winn, 91 Am. Dec. 186, 193, note; Cohens *v.* Virginia, 6 Wheat. 264, 409; Chipman *v.* City of Waterbury, 59 Conn. 496; 22 Atl. Rep. 289.

"A writ of error is a writ issuing from a superior court commanding an inferior court of record to send up the entire record of a contested procedure." 6 Am. & Eng. Enc. of Law, 812.

[4] Lynes *v.* State, 5 Porter (Ala.), 236; 30 Am. Dec. 557.

"In Co. Lit. 288 b, and in 2 Bac. Abr. 187, a writ of error is said to be an original writ, issuing out of the court of chancery in the nature as well of a *certiorari*, to remove a record from an inferior into a superior court, as of a commission to the judges of such superior court, to examine the record, and to affirm or reverse it, according to law; and lies where a party is aggrieved by any error in the foundation, proceeding, judgment, or execution of a suit in a court of record. This writ does not owe its origin to a statute. Its uses have been in some instances directed by the legislature, and as a remedial process, it has in some cases been extended. Its name indicates its true purpose. And in the case of The Queen *v.* Paty, 2 Salk. 504, it was held to be grantable in all cases *ex debito justitiæ*, except in treason and felony: See further to the same effect, a very elaborate note to 2 Saund. 100, n. 1. In treason and felony it was necessary to obtain the king's consent before the writ

It is a common law remedy for the review and correction of errors of law appearing upon the face of the record;[1] but is one that is regulated, to a great extent, at the present day, by statute.[2] It is held that the remedy is not applicable to a special statutory proceeding.[3] The record can not be contradicted under the writ, but is conclusive.[4]

The record includes all proper bills of exceptions, and the writ will therefore reach errors occurring at the trial, as, for example, rulings upon the admission of evidence, and the like, properly brought into the record by bill of exceptions, and is not confined to errors affecting the pleadings and other matters which, without a bill of exceptions, would appear upon the face of the record.[5] As to such matters it must affirmatively appear by a bill of exceptions that error was committed;[6] but other modes of bringing matters into the record than by bill of exceptions may be provided by statute, and this has been done in some of the states, at different times.[7]

The writ, as it existed at common law, can not be used to review an order made after judgment.[8]

In the federal courts the proper proceeding for the review of a judgment at law is by a writ of error and for the review of a decree of a court of equity or admiralty by appeal.[9]

The writ is the proper remedy in a criminal case.[10]

could issue. Yates *v.* People, 6 Johns. 337." Lynes *v.* State, 5 Porter (Ala.), 236; 30 Am. Dec. 557, 559.

[1] Suydam *v.* Williamson, 20 How. 427; Gaffney *v.* People, 50 N. Y. 416; People *v.* Casey, 72 N. Y. 393; Reece *v.* Knott, 3 Utah, 436; 24 Pac. Rep. 759.

[2] Chipman *v.* City of Waterbury, 59 Conn. 496; 22 Atl. Rep. 289; Reece *v.* Knott, 3 Utah, 436; 24 Pac. Rep. 759.

[3] Ray *v.* Gore, 36 N. W. Rep. 739.

[4] Holford *v.* Alexander, 12 Ala. 280; 46 Am. Dec. 253.

[5] Suydam *v.* Williamson, 20 How. 427; Gaffney *v.* People, 50 N. Y. 416.

[6] Johnson *v.* Lightsey, 34 Ala. 169; 73 Am. Dec. 450; Kirk *v.* Murphy, 16 Tex. 654; 67 Am. Dec. 640; Suydam *v.* Williamson, 20 How. 427.

[7] Wheeler *v.* Winn, 53 Pa. St. 122; 91 Am. Dec. 186.

[8] Polk *v.* Butterfield, 9 Colo. 325; 12 Pac. Rep. 216.

[9] Foster's Fed. Prac., sec. 394.

[10] Twitchell v. Pennsylvania, 7 Wall. 321.

As a rule, the office of the writ is confined, in the state courts, to common law actions; but this is subject to statutory control, and in some of the states the writ is allowed to review decrees in equity as well as judgments at law.[1]

The writ can not be used to control or affect the decision of matters resting in the discretion of the lower court.[2] It will issue only after final judgment, and can not be used to review interlocutory decisions, orders or decrees.[3] For this reason the writ will not issue from the supreme court of the United States to a state court of last resort on the reversal of a cause,[4] or from one state court to another in such case.[5]

It is otherwise where, in addition to a reversal, a judgment is ordered to be entered by the lower court that will be final.[6] A judgment of non-suit is a final judgment within the rule.[7]

The writ is sometimes held to be a writ of right issuing as of course,[8] and it is generally so treated in practice in the state courts. As to the writ *coram nobis* it is held that it is not a writ of right and can only issue upon a showing of some error of fact.[9] So the writ will not issue from the federal to the state courts as a matter of right.[10]

Litigants have no vested right to the writ. Therefore it may not only be controlled and limited by statute, but the right to it may be entirely taken away in the absence

[1] Farish *v.* N. Mexico M. Co., 21 Pac. Rep. 82.

[2] Wann *v.* McNulty, 2 Gil. (Ill.) 355; 43 Am. Dec. 58; Delaware, etc., Co. *v.* Nevelle, 51 N. J. Law, 332; 19 Atl. Rep. 538.

[3] Hammond *v.* People, 32 Ill. 446; 83 Am. Dec. 286; Gerish *v.* Johnson, 5 Minn. 23; Young *v.* Jones, 89 Ga. 390; 15 S. E. Rep. 488; Davis *v.* Crouch, 94 U. S. 514; Brady *v.* Toledo, etc., Co., 73 Mich. 457; 41 N. W. Rep. 503; State *v.* Reed, 32 Pac. Rep. 202.

[4] Davis *v.* Crouch, 94 U. S. 514.

[5] Buck *v.* County of Hamilton, 99 Ill. 507.

[6] Commissioners *v.* Lucas, 93 U. S. 108.

[7] Murdock *v.* Martin, 132 Pa. St. 86; 18 Atl. Rep. 1114.

[8] Van Antwerp *v.* Newman, 4 Cowen (N. Y.) 82; 15 Am. Dec. 340.

[9] Tyler *v.* Morris, 4 Dev. & Bat. Law (N. Car.) 487; 34 Am. Dec. 395.

[10] Twitchell *v.* Pennsylvania, 7 Wall. 321; The Anarchists Case, 123 U. S. 131; 8 Sup. Ct. Rep. 21.

of any constitutional provision preserving the right.[1] It is only allowed to a party or privy to the judgment or one prejudiced thereby, and such interest must appear from the record,[2] subject of course to the right of substitution of the representatives of a party in proper cases.[3]

In some of the cases the right is confined to parties to the record.[4]

The proceeding is so far an original one that notice thereof must be given, and new issues formed.[5] This is true of the writ *coram nobis* as well.[6]

The usual mode of putting the proceeding in motion is by a petition for the writ, the form and substance of which is, in some of the states, provided by statute;[7] and upon the filing of the petition a summons or citation issues.[8]

Where there are two attorneys of record for the same party, service upon one of such attorneys is sufficient as to that party.[9]

The pleading of the plaintiff is the assignment of errors, which is a limitation of the jurisdiction of the court, as only such errors as are assigned can be considered by the court of errors,[10] and an issue is formed upon the assignment which constitutes the matter to be tried.[11]

A presentation to and decision upon the question by the court below is a necessary foundation for the jurisdiction of the court of errors. Therefore, it must appear from the record that the matter in controversy was presented to

[1] People *v.* Richmond, 16 Colo. 274; 26 Pac. Rep. 929.

[2] Townsend *v.* Davis, 1 Ga. 495; 44 Am. Dec. 675; Holford *v.* Alexander, 12 Ala. 280; 46 Am. Dec. 253; Smith *v.* Gerlach, 2 Tex. 424; 47 Am. Dec. 657; Wheeler *v.* Winn, 91 Am. Dec. 186, 194, note.

[3] Life Association *v.* Fassett, 102 Ill. 315.

[4] Moreau *v.* Saffarans, 3 Sneed (Tenn.), 595; 67 Am. Dec. 582.

[5] Lessee of Taylor *v.* Boyd, 3 Ohio, 337, 354; 17 Am. Dec. 603; Widber *v.* Superior Court, 94 Cal. 430; 29 Pac. Rep. 870; International Bank *v.* Jenkins, 104 Ill. 143.

[6] Holford *v.* Alexander, 46 Am. Dec. 253, 260, note.

[7] Alliance Milling Co. *v.* Eaton, 24 S. W. Rep. 392.

[8] Schonfield *v.* Turner, 6 S. W. Rep. 628.

[9] Comstock *v.* Cole, 28 Neb. 470; 44 N. W. Rep. 487.

[10] Parmelee *v.* Fischer, 22 Ill. 212; 74 Am. Dec. 138.

[11] Holford *v.* Alexander, 46 Am. Dec. 253, 260, note.

the lower court for its decision, or the question will not be considered under the writ.

Errors of fact can not be corrected by writ of error.[1] For such an error, the remedy is by motion for a new trial.[1]

The writ has been abolished by some of the states, and all questions that might have been reviewed under the writ at common law are made reviewable by appeal.[2]

The legislature has the power to regulate and determine the mode by which questions may be presented to appellate courts for review.[3]

Where it is provided by statute that the same shall be taken up and presented by appeal, without in terms abolishing the writ of error, such writ will only be allowed in a case where no appeal is allowed by statute.[4] In many of the states, however, either an appeal or a writ of error are allowed in the same action, at the option of the party, and in some cases both may be prosecuted.

Provisions are made by statutes of the United States and of the several states regulating the jurisdiction under the writ, as to amount, as to the time within which the writ may issue, providing in what cases the writ may issue from the supreme court of the United States to the state courts, and otherwise regulating and limiting the jurisdiction of the different courts. It is not within the scope of this work to attempt to review these provisions or to refer to these statutory regulations, which are different, probably, in every state. In some of the states, the jurisdiction has been extended by constitutional and statutory provisions so as to authorize the review of orders and judgments that would not have been reviewable under the common law writ.[5]

[1] People *v.* Haynes, 14 Wend. 546; 28 Am. Dec. 530.

[2] 6 Am. & Eng. Enc. of Law, 835; Thurber *v.* Townsend, 22 N. Y. 517.

[3] Haight *v.* Gay, 8 Cal. 297; 68 Am. Dec. 323; People *v.* Richmond, 16 Colo. 274; 26 Pac. Rep. 929.

[4] Haight *v.* Gay, 8 Cal. 297; 68 Am. Dec. 323; Sacramento, etc., R. R. Co. *v.* Harlan, 24 Cal. 334; Widber *v.* Superior Court, 94 Cal. 430; 29 Pac. Rep. 870; Livingston *v.* State, 70 Tex. 393; 11 S. W. Rep. 115.

[5] Union Church *v.* Sanders, 1 Hous. (Del.) 100; 63 Am. Dec. 187

A writ of error suspends proceedings in the court below, but does not vacate the judgment sought to be reversed.[1]

Where a petition for the writ is provided for, the filing of the petition is held to suspend all further action in the court below.[2]

Jurisdiction of the writ can not be conferred by consent of parties where the court has none by law.[3]

86. CERTIORARI.—The writ of *certiorari* is a writ by which the record of a proceeding in a lower court is removed into a higher court for review.[4] It is one of the means by and through which superior courts exercise and enforce their supervisory power and control over courts and tribunals of inferior jurisdiction,[5] and lies where the party aggrieved has no adequate and speedy remedy by the ordinary proceedings at law, as, for example, by writ of error or appeal, or by motion in the court before which the action is pending.[6]

It is held in some of the cases that the fact that a party has his remedy by appeal or writ of error will not deprive him of the right to resort to the writ where it is claimed

[1] Railway Co. *v.* Twombly, 100 U. S. 78, 81.

[2] Texas State Fair *v.* Lyon, 24 S. W. Rep. 328.

[3] Chipman *v.* City of Waterbury, 59 Conn. 496; 22 Atl. Rep. 289.

[4] Anderson's Dic. of Law, 161.

[5] Le Roy *v.* Mayor, 20 Johns. 430; 11 Am. Dec. 289; Jackson *v.* People, 9 Mich. 111; 77 Am. Dec. 491; Miller *v.* Trustees, 88 Ill. 26; State *v.* Webber, 37 N. W. Rep. 949; City of Camden *v.* Mulford, 26 N. J. Law, 49; Drainage Commissioners *v.* Giffin, 134 Ill. 330; 25 N. E. Rep. 995; Mowery *v.* City of Camden, 49 N. J. Law. 106; 6 Atl. Rep. 438; State *v.* Herndon, 107 N. Car. 934; 12 S. E. Rep. 268.

[6] Alabama G. S. R. Co. *v.* Christian, 82 Ala. 307; 1 Sou. Rep. 121; Faut *v.* Mason, 47 Cal. 7; Stuttmeister *v.* Superior Court, 71 Cal. 322; In re Stuttmeister, 12 Pac. Rep. 270; Donahue *v.* County of Will, 100 Ill. 94; Hyslop *v.* Finch, 99 Ill. 171; Miller *v.* Trustees, 88 Ill. 26; Saunders *v.* Sioux City Nursery, 6 Utah, 431; 24 Pac. Rep. 532; Ducheneau *v.* House, 4 Utah, 363; 10 Pac. Rep. 427; Nevada Cent. R. Co. *v.* District Court, 21 Nev. 409; 32 Pac. Rep. 673; Poe *v.* Machine Works, 24 W.Va. 517; State *v.* Webber, 37 N.W. Rep. 949; Harris *v.* Barber, 129 U. S. 366; 9 Sup. Ct. Rep. 314; Trustees of Schools *v.* Shepherd, 139 Ill. 114; 28 N. E. Rep. 1073; State *v.* Probate Court, 51 Minn. 241; 53 N. W. Rep. 463.

that the judgment is void for want of jurisdiction.[1] But in most of the codes or statutes on the subject the limitation of the right to the writ to cases where the party has no speedy and adequate remedy by appeal or other ordinary proceeding is general and applies to cases where there is want of jurisdiction, as well as to others, if the writ is allowed for other causes.[2]

To the extent that the writ is necessary to uphold and enforce the general power of supervision which belongs to all superior courts, such courts can not be deprived of the power to use it by a statutory provision abolishing the common law writ.[3] So where the power to issue the writ is given by the constitution.[4] But the remedy may, as we shall see hereafter, be taken away by providing another by appeal or otherwise, and this is held to be so even where the judgment is absolutely void.[5]

The writ has been defined as one "issuing from a superior court to an inferior court, tribunal, or officer exercising judicial powers, whose proceedings are summary, or in a course different from the common law, commanding the latter to return the records of a cause depending before it to the superior court."[6]

The limitation of the right to the writ to courts whose proceedings are summary and not according to the course of the common law, rests upon the doctrine that for the correction of errors in the proceedings of a common law court a writ of error is the proper remedy, but that it will

[1] Gaither *v.* Watkins, 66 Md. 576; 8 Atl. Rep. 464; Memphis, etc., R. Co. *v.* Brannum, 11 Sou. Rep. 468; Harris *v.* Barber, 129 U. S. 366; 9 Sup. Ct. Rep. 314.

[2] Sioux Falls Nat. Bank *v.* McKee, 50 N. W. Rep. 1057.

[3] Jackson *v.* People, 9 Mich. 111; 77 Am. Dec. 491.

[4] Vaughn *v.* City of Ashland, 37 N. W. Rep. 809. But see on this point People *v.* Board of Supervisors, 2 N. Y. Supl. 555.

[5] Sioux Falls Nat. Bank *v.* McKee, 50 N. W. Rep. 1057.

[6] 3 Am. & Eng. Enc. of Law, 60; Alabama G. S. R. Co. *v.* Christian, 82 Ala. 307; 1 Sou. Rep. 121; Dryden *v.* Swinburn, 15 W. Va. 234; Lessee of Walpole *v.* Ink, 9 Ohio, 142; Wedel *v.* Green, 70 Mich. 642; 38 N. W. Rep. 638; Farmington River, etc., Co. *v.* County Commissioners, 112 Mass. 206, 212.

not run to a statutory court which proceeds summarily and not according to the course of the common law, and therefore the writ of *certiorari* will be allowed where a writ of error can not be prosecuted.[1]

It would seem from this that the writ of *certiorari* is the appropriate remedy where judgments or proceedings can not be reached by writs of error and for the reason that they can not be so reached, and that the office of the writ is the same as the writ of error.[2] But it will be seen further on in this section that the writ is not generally so regarded, or treated, in practice. This results, partly, from statutory provisions changing the character of the writ, but it is the result, also, of the diversity of judicial decisions which have warped the writ out of all semblance of itself and in almost every conceivable way, and made it a different writ in almost every state in this country.

Undoubtedly the principle upon which *certiorari* is generally allowed is that it is necessary to protect a party where a remedy by ordinary methods is not open to him, and to prevent injustice which must result from the want of such other remedy. So considered it is a highly important and useful writ, and the rules governing its issuance and enforcement are simple enough. But the issuance of the writ, the jurisdiction of the courts respecting it, and the practice relating to the proceedings under it can not be said to rest, at the present day, upon any fixed or intelligible principles. Properly regarded the writ has two objects, viz., to supply the place of a writ of error where the lower court is such that its proceeding can not be reviewed by the latter writ, and to test the jurisdiction of the court without reference to the existence of some other remedy.

So the jurisdiction of the courts would be simple enough if the writ were regarded as in the nature of a writ of error,

[1] Dryden *v.* Swinburn, 15 W. Va. 234, 251; Lessee of Walpole *v.* Ink, 9 Ohio, 142.

[2] Farmington River, etc., Co. *v.* County Commissioners, 112 Mass. 206, 212; Harris *v.* Barber, 129 U. S. 366; 9 Sup. Ct. Rep. 314.

or appeal for the correction of errors of law, where neither of these remedies were allowed; and allowed, also, to test the jurisdiction of the court, and for that purpose only, whether a writ of error or appeal is allowed or not. It is quite evident that the common law writ was never intended to extend further than this. For one of these purposes it is in all essential respects a writ of error, and for the other a jurisdictional writ entirely, and only available where the judgment attacked is void for want of jurisdiction, either of the subject-matter or of the person.[1]

[1] Harris *v.* Barber, 129 U. S. 366; 9 Sup. Ct. Rep. 314.

The different modes of reviewing the proceedings and judgments of inferior courts and the distinction between them, as well as the effect of statutory provisions respecting them, are thus stated in a late case: "Prior to the act of May 9, 1889, there were three of these in common use, and the peculiar characteristics of each were well understood by the profession. That most generally employed was the writ of error, which lay against any final judgment in any court of record, and against such interlocutory and auxiliary orders as have been made reviewable upon it by statute. On this writ the judgment is reviewed with reference to alleged errors which are pointed out by exceptions taken to the action of the trial court at the time when the rulings are made, and as a general rule the power of the supreme court is limited to the questions so raised. Poor District of Warsaw *v.* Poor District of Knox Township, 107 Pa. St. 301. In all equity cases, and those following the equity forms, an appeal from the decree complained of is the proper mode of review. It brings up the pleadings and the evidence on which the decree rests, and makes it necessary for the appellate court to examine, and see whether the decision is just and conscionable on the case that was presented to the chancellor who made it. The remaining method was by writ of *certiorari*. This writ brought up the record in any given case for review and correction, but it brought the record only. Carlson's License, 127 Pa. St. 330; 18 Atl. Rep. 8; Holland *v.* White, 120 Pa. St. 228; 13 Atl. Rep. 782, 783. The errors to be corrected must appear on the face of the record (Chase *v.* Miller, 41 Pa. St. 403), and the merits can not be inquired into upon this writ, but are left to the judgment of the court below. (Election cases, 65 Pa. St. 20.) Neither the opinion of the court, nor the evidence, forms any part of the record proper, and for that reason they will not be examined on *certiorari*. Holland *v.* White, supra. The character of the proceeding to be reviewed, suggested, therefore, the method to be adopted, and the limits within which the practitioner should direct his preparation. Since the act of 1889, these modes remain applicable in the same cases, within the same limits, and with the same effect as before, the only difference be-

The definition given above does not cover the writ as it is generally used at the present day. Its office is not confined to the supervision of courts whose proceedings are summary, or different from the course of the common law, although the common law writ, so construed, is adopted in some of the states.[1] On the contrary, it runs to all inferior courts in proper cases, whether they be common law or statutory courts, or whether their jurisdiction is summary or in accordance with the common-law proceedings;[2] and to tribunals other than courts exercising judicial or *quasi* judicial functions.[3]

ing that now they are all called by the same name. That act provides 'that all appellate proceedings in the supreme court heretofore taken by writ of error, appeal or *certiorari*, shall hereafter be taken in a proceeding to be called an "appeal."' It will be noticed that this act does not profess to extend the right of review, to change its extent in cases already provided for, or to modify in any manner its exercise. It simply provides that dissimilar proceedings shall be called by the same name. An appeal in name may therefore be a writ of error or a *certiorari* in legal effect, and it is necessary, in every case, to look into the record, and determine at the outset of our examination, whether what is 'called an "appeal"' is such in fact, or is a writ of error or a *certiorari*. The practical effect of calling proceedings so essentially unlike by the same name is to obscure and divert attention from the peculiar characteristics of each. This increases the sense of uncertainty on the part of the practitioner, and the labor on the part of the appellate court." Appeal of Long, 134 Pa. St. 641; 19 Atl. Rep. 806.

[1] Lessee of Walpole *v.* Ink, 9 Ohio, 142; Farmington River, etc., Co. *v.* County Commissioners, 112 Mass. 206, 212.

[2] Miller *v.* Trustees, 88 Ill. 26.

[3] Le Roy *v.* Mayor, 20 Johns. 430; 11 Am. Dec. 289; State *v.* Dodge County, 56 Wis. 79; 13 N. W. Rep. 680.

"As examples of inferior tribunals to which a *certiorari* lay at the common law, the following may be instanced in England: the court leet, the quarter sessions, the Old Bailey, the sessions of the city of Rochester, two justices authorized by statute to appoint overseers of the poor, justices in eyre, justices of jail, justices of a county palatine, the college of physicians having a special power by statute to impose fines, etc., justices of the peace, etc., even in those cases in which they are empowered by statute finally to hear and to determine; commissioners of sewers, the courts of the cinque ports, the grand sessions, and other courts in Wales, the city courts of London and Middlesex, justices of assize, orders of conviction on the conventicle act, 22 Car. II., c. 1, and orders on appeal from scavenger's rate, orders of bastardy, an

At common law it was an extraordinary legal remedy;[1] but, under many of the statutes in this country, it has become, to a very great extent, an ordinary writ for the correction of errors. Hence the reference in so many of the cases to the common-law writ of *certiorari* as distinguished from the statutory writ. Under the former English practice, the writ, for one of its purposes, might issue at any stage of the proceedings, and, when issued during the pendency of the action, had the effect to transfer the action from the lower to the higher court for further proceeding in that court.[2] And such a transfer and trial *de novo* are allowed by statute in some of the states,[3] or the court is authorized to enter such judgment as the law requires instead of remanding the cause.[4] But, as a

inquisition taken before the sheriff under a private act of Parliament. 2 Bac. Abr. 163.

"Examples of like inferior tribunals in the several states of the Union are too numerous and diverse to mention, such as commissioners of highways in New York: People *v.* Van Alstyne, 32 Barb. 132; quarter sessions in Pennsylvania in laying out highways: Ruhlman *v.* Commonwealth, 5 Binn. 24; Buckmyer *v.* Dubs, 5 Id. 29; Baltimore Turnpike Case, 5 Id. 482; the courts of sessions in Maine in laying out roads: Bath Bridge & T. Co. *v.* Magoun, 8 Me. 292; the court of common pleas acting under the statute for the support and regulation of mills: Commonwealth *v.* Ellis, 11 Mass. 462; the county court in North Carolina: Anonymous, 1 Hayw. 303; justices' court for trial of negroes for felony under statute in Tennessee: Bob *v.* State, 2 Yerg. 173; and justices' court under act for punishment of riots, etc., in Virginia: Mackaboy *v.* Commonwealth, 2 Va. Cas. 269. A tribunal which is not a common-law court, which does not proceed according to the course of the common law, a newly created, limited, and special jurisdiction from which no appeal is allowed by statute, nor writ of error by the common law, yet determining in a summary way the most important rights and franchises, both as respects the people and private persons, is and can not be otherwise than an inferior tribunal in the strictest sense of the word." Cunningham *v.* Squires, 2 W. Va. 422; 98 Am. Dec. 770.

[1] Alabama G. S. R. Co. *v.* Christian, 82 Ala. 307; 1 Sou. Rep. 121.

[2] Duggen *v.* McGruder, 12 Am. Dec. 532, note; Dryden *v.* Swinburn, 20 W. Va. 89, 105; Lessee of Walpole *v.* Ink, 9 Ohio, 142; Bee *v.* Seaman, 36 W. Va. 381; 15 S. E. Rep. 173.

[3] Duggen *v.* McGruder, 12 Am. Dec. 532, note; Linch *v.* Broad, 70 Tex. 92; 6 S. W. Rep. 751; Wright *v.* Hurt, 92 Ala. 591; 9 Sou. Rep. 386.

[4] Old Colony R. Co. *v.* City of Fall River, 147 Mass. 455; 18 N. E. Rep. 425.

general rule, the writ in this country is not allowed until after final judgment, as in case of a writ of error,[1] but may be used to review proceedings subsequent to the judgment,[2] and may, in the discretion of the court, issue before final judgment in a proper case.[3] So in some of the states, where the writ issues after final judgment, a new trial may be ordered and such new trial had in the court issuing the writ.[4] This can not be done, however, where the writ is allowed to test the jurisdiction of the court and not as a substitute for a writ of error or appeal.

The writ is remedial, and not preventive, and can not be used to prevent an anticipated act in excess of jurisdiction.[5]

In some of the states it is treated as a purely jurisdictional writ, at common law, and where not changed or modified by statute; its object being to determine whether the inferior court or tribunal has acted within its jurisdiction,[6] and not to correct errors or irregularities, or to reverse or affirm the proceedings of the lower court.[7] But

[1] Duggen *v.* McGruder, 12 Am. Dec. 531, note; Chicago & N. W. Ry. Co. *v.* Osborne, 146 U. S. 354; 13 Sup. Ct. Rep. 281; Lessee of Walpole *v.* Ink, 9 Ohio, 142; Sayers *v.* Superior Court, 84 Cal. 642; 24 Pac. Rep. 296; People *v.* Gilon, 13 N. Y. Supl. 455; State *v.* District Court, 44 Minn. 244; 46 N. W. Rep. 349; Bee *v.* Seaman, 36 W. Va. 381; 15 S. E. Rep. 173; State *v.* Edwards, 104 Mo. 125; 16 S. W. Rep. 117; State *v.* Georgia Co., 109 N. Car. 310; 13 S. E. Rep. 861.

[2] Krumeick *v.* Krumeick, 14 N. J. Law, 39, 41.

[3] Mowery *v.* City of Camden, 49 N. J. Law, 106; 6 Atl. Rep. 438.

[4] Bee *v.* Seaman, 36 W. Va. 381; 15 S. E. Rep. 173.

[5] Sayers *v.* Superior Court, 84 Cal. 642; 24 Pac. Rep. 296.

[6] People *v.* Board of Delegates, 14 Cal. 479, 494, 499; Varrell *v.* Church, 36 Wis. 318; Milwaukee Iron Co. *v.* Schubel, 29 Wis. 444; 9 Am. Rep. 591; Smith *v.* Bahr, 62 Wis. 244; 22 N. W. Rep. 438; State *v.* Monroe, 41 La. Ann. 314; 6 Sou. Rep. 539; State *v.* Houston, 40 La. Ann. 434; 4 Sou. Rep. 131; Finch *v.* Tehama Co., 29 Cal. 454; Alexander *v.* Archer, 21 Nev. 22; 24 Pac. Rep. 373; Sherer *v.* Superior Court, 96 Cal. 653; 31 Pac. Rep. 565; Andrews *v.* Pratt, 44 Cal. 309; State *v.* Smith, 101 Mo. 174; 14 S. W. Rep. 108; Harris *v.* Barber, 129 U. S. 366; 9 Sup. Ct. Rep. 314; Carolan *v.* Carolan, 47 Ark. 511; 2 S. W. Rep. 105; State *v.* Moniteau, 45 Mo. App. 387.

[7] Varrell *v.* Church, 36 Wis. 318; People *v.* Highway Commissioners, 30

the writ is not confined to the question of jurisdiction of the subject-matter, but extends to a want of jurisdiction of the person as well.[1] Under such a rule the proceedings of the lower court can only be reached by the writ when they are absolutely void.[2]

In some of the cases it is held that the question whether the inferior tribunal has proceeded regularly, or according to law, may be inquired into,[3] which may be given a very broad or a very narrow meaning. A court which acts upon an erroneous view of the law which should govern the decision of a cause, or commits errors from which an erroneous conclusion is reached, can not be said to have proceeded according to law. But what is meant by not proceeding according to law, in this connection, is, in substance, that the forms of law which should be observed in the administration of justice have not been followed; for example, a judgment rendered without a trial, where the parties were entitled to and were demanding it, would be within this ground for the writ. But if the court should, during the trial, commit an error in refusing to permit the introduction of competent evidence, or any other error affecting the rights of the parties, it would be nothing more than an erroneous decision and not a departure from the established forms of procedure.[4] And

N. Y. 72; Petty *v.* Ducker, 51 Ark. 281; 11 S. W. Rep. 2; State *v.* Perrault, 41 La. Ann. 179; 6 Sou. Rep. 18; Carolan *v.* Carolan, 47 Ark. 511; 2 S. W. Rep. 105; State *v.* Moniteau, 45 Mo. App. 387.

[1] La Grand *v.* Fairhall, 53 N. W. Rep. 115; Memphis, etc., C. Co. *v.* Brannum, 11 Sou. Rep. 468; Carolan *v.* Carolan, 47 Ark. 511; 2 S. W. Rep. 105.

[2] State *v.* Koenig, 39 La. Ann. 776; 2 Sou. Rep. 559; Petty *v.* Ducker, 51 Ark. 281; 11 S. W. Rep. 2; State *v.* Riley, 8 Sou. Rep. 598; State *v.* Coco, 7 Sou. Rep. 620.

[3] Donahue *v.* County of Will, 100 Ill. 94; Blair *v.* Sennott, 134 Ill. 78; 24 N. E. Rep. 969; People *v.* Board of Assessors, 39 N. Y. 81, 88; State *v.* Rightor, 39 La. Ann. 619; 2 Sou. Rep. 385; State *v.* Perrault, 41 La. Ann. 179; 6 Sou. Rep. 18; Tomlinson *v.* Board of Equalization, 88 Tenn. 1; 12 S. W. Rep. 414.

[4] Doolittle *v.* Galena, etc., R. Co., 14 Ill. 381; People *v.* Board of As-

at last this is really an excess of jurisdiction and should be included within that ground for the writ. It is a question that affects the validity of the judgment, and a judgment that is invalid or illegal is one rendered in excess of or without jurisdiction.[1]

sessors, 39 N. Y. 81, 88; Tomlinson *v.* Board of Equalization, 88 Tenn. 1; 12 S. W. Rep. 414.

[1] "The office of the writ of *certiorari* in this state is defined by statute (Pr. Act, sec. 456), and only embraces cases in which 'an inferior tribunal, board, or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board, or officer, and there is no appeal, nor, in the judgment of the court, any plain, speedy, and adequate remedy.' These are the only cases in which the writ lies, and upon its return the sole inquiry to be made is 'whether the inferior tribunal, board, or officer, has regularly pursued the authority of such tribunal, board, or officer.' (Sec. 462.) '*Has exceeded the jurisdiction of such tribunal, board,*' etc., and '*has regularly pursued the authority of such tribunal, board,*' etc., as expressed in these two respective sections of the Practice Act, present substantially the same idea. Mere irregularity intervening in the exercise of an admitted jurisdiction—mere mistakes of law committed in conducting the proceedings in an inquiry which the board had authority to entertain—as, for instance, the admission of evidence not the best in degree, or not applicable to the issue in hand, are not to be considered here upon *certiorari*, otherwise that writ is to be turned into a writ of error." Central Pac. R. Co. *v.* Placer Co., 43 Cal. 365, 367; Reilly *v.* Tyng, 1 Ariz. 510; 25 Pac. Rep. 798; Tomlinson *v.* Board of Equalization, 88 Tenn. 1; 12 S. W. Rep. 414.

The effect of the writ has been thus tersely stated: "The common-law writ of *certiorari* simply brings before the court, for inspection, the record of the commissioners of highways; and its judgment affects the validity of the record alone—*i. e.*, determines that it is valid or invalid." Hyslop *v.* Finch, 99 Ill. 171, 177.

And again: "Its office extends, unquestionably, to the review of all questions of jurisdiction, power, and authority of the inferior tribunal to do the acts complained of, and all questions of regularity in the proceedings, that is, all questions whether the inferior tribunal 'has kept within the boundaries prescribed for it by the express terms of the statute law or by well-settled principles of the common law." People *v.* Board of Assessors, 39 N. Y. 81, 88.

"Having disposed of this preliminary question, the next inquiry is, to what extent can this court go in reviewing the proceedings of the board of delegates? Section 462 of the Practice Act provides that 'the review upon this writ shall not be extended further than to determine whether the inferior tribunal, board, or officer, has regularly pursued the authority of such tribunal, board, or officer.' We have already seen that the writ can be granted only where the jurisdiction of the in-

Another element of uncertainty has been brought into the law affecting the writ by statutes authorizing its issuance where a tribunal, board, or officer, has acted illegally. The term "illegally," thus used, must mean very much the same as the charge that the tribunal or officer has "not acted according to law." It must mean some act, or omission to act, which affects the validity of a judgment or other proceeding, and not some error committed by a court having jurisdiction which would render the judgment erroneous but not void.[1]

ferior tribunal has been exceeded; and, taking these two provisions together, it is clear that the courts are confined to the determination of the question of jurisdiction. Beyond this, they have no right or authority to go; and they have nothing whatever to do with the proceedings before the inferior tribunal, except so far as an examination of such proceedings is necessary for the determination of this question. Chief Justice Murray suggested, in People ex rel. Church *v.* Hester (6 Cal. 679), that at common law the province of this writ is more ample than under our statute, as it is not confined to mere questions of jurisdiction. While we fully agree that, under our statute, the writ has no other effect than to raise the mere question of power, a careful examination of the subject has satisfied us that the learned judge was impressed with a very serious mistake in regard to the functions of the writ at common law. We think it is well settled that a common-law *certiorari* tries nothing but the jurisdiction, and, incidentally, the regularity of the proceedings upon which the jurisdiction depends. It brings up no issue of law or fact not involved in the question of jurisdiction. Under no circumstances can the review be extended to the merits. Upon every question, except the mere question of power, the action of the inferior tribunal is final and conclusive. This we understand to be the settled doctrine, both in England and in this country. The provisions of our statute are merely in affirmance of the common law. The nature and effect of the writ remain unchanged. Its functions are neither enlarged nor diminished, and the rules and principles which govern its operation are still the same." People *v.* Board of Delegates, 14 Cal. 479, 499.

[1] Tiedt *v.* Carstensen, 61 Ia. 334; 16 N. W. Rep. 214; Polk Co. *v.* City of Des Moines, 70 Ia. 351; 30 N. W. Rep. 614.

"Code, section 3216, provides that 'the writ of *certiorari* may be granted whenever specially authorized by law, and especially in all cases where an inferior tribunal, board or officer exercising judicial functions is alleged to have exceeded his proper jurisdiction, or is otherwise acting illegally, when, in the judgment of the superior court, there is no other plain, speedy, and adequate remedy.' The proceeding by *certiorari* is intended as a remedy whereby the superior court may inquire into the jurisdiction of the inferior tribunal or officer and determine

The operation of the writ has been so limited, in some of the cases, as to prevent its use where the answer of a defendant was arbitrarily stricken out, a trial denied him, and a judgment rendered against him as upon a default.[1] But such a proceeding can not justly be regarded as a proceeding according to law, even in the restricted sense of the term; and the doctrine announced in the case cited

whether the tribunal or officer 'is acting illegally.' In this case there is no question of jurisdiction. We are, therefore, only to inquire, when is a tribunal 'acting illegally' in the contemplation of this statute? When the law prescribes proceedings to be had by an officer or tribunal in cases pending before them, the omission of such proceedings are in violation of law, and the court or officer omitting them would, therefore, act illegally. In a word, if a tribunal, when determining matters before it which are within its jurisdiction, proceeds in a manner contrary to law, it acts illegally. But if a discretion is conferred upon the inferior tribunal, its exercise can not be illegal. If it be clothed with authority to decide upon facts submitted to it, the decision is not illegal, whatever it may be, if the subject-matter and the parties were within its jurisdiction; for the law intrusts the decision to the discretion of the tribunal. From this brief statement it will be plainly seen that the statute does not contemplate that decisions of inferior tribunals upon questions of fact may be reviewed by the writ of *certiorari*. The distinction between erroneous proceedings which are termed 'illegalities' and erroneous decisions of fact are obvious. See Smith *v.* Board of Sup'rs, 30 Iowa, 531; McCollister *v.* Shuey, 24 Iowa, 362; Jordan *v.* Hayne, 36 Iowa, 9.

"Code, section 3222, provides that a trial in a proceeding by *certiorari* may be 'on the record, proceedings, and facts certified,' the return to the writ, 'and such other testimony, oral and written, as either party may introduce pertinent to the issue.' This provision is not intended to extend the remedy so that inquiry may be made into matters other than the jurisdiction and legality of the proceeding of the inferior court. It is not the purpose of the statute to change the office of a *certiorari*, so that it will operate as an appeal, wherein causes may be tried *de novo*. The scope of the remedy is not extended; it remains restricted to questions of jurisdiction and the regularity of the proceedings of the inferior court. It sometimes happens that the return to the writ of *certiorari* fails to show the facts whereon the jurisdiction of the inferior court is based, or the regularity or irregularity of the forms of proceedings brought in question. That all the facts involved in the case, bearing upon the issues in the proceeding touching the jurisdiction and compliance with the law in the case reviewed, may be considered, the statute last cited provides for the introduction of evidence other than the return to the writ." Tiedt *v.* Carstensen, 61 Ia. 334; 16 N. W. Rep. 214.

[1] Sherer *v.* Superior Court, 96 Cal. 653; 31 Pac. Rep. 565.

is not likely to find favor in subsequent decisions. A proceeding by which a party is arbitrarily, and without right, denied a trial, and judgment rendered against him without a hearing, should be treated as an act in excess of the jurisdiction of the court.[1] But where the action of the court in striking out a pleading involves an investigation and decision of a question of law or fact and the denial of a trial results therefrom, it is an injury resulting, alone, from an erroneous ruling of the court, made in the orderly conduct of a case, and not an excess of jurisdiction. Therefore, under the rule that only jurisdictional questions can be raised by *certiorari*, the writ would not lie in such a case. And so it has been held.[2]

In some instances a distinction is made between cases where there is no other available remedy, and the writ is necessary to prevent injustice, and those cases in which an appeal, writ of error, or other remedy may be resorted to, as to the extent to which the writ may go, it being held that, in the former class of cases, the writ will be extended to the review of merely erroneous decisions, while in the other it will be confined to what is acknowledged to be its original and appropriate office, viz., to determine whether the court has proceeded within its jurisdiction.[3]

[1] In a dissenting opinion rendered by Mr. Justice Paterson, in the case cited, it is said: "I am unable to agree with the majority in this case. When it appears upon the face of the record that judgment has been arbitrarily rendered in any case against a party, without a trial or hearing, as if he were in default, when he is not, the action of the court—it matters not what court it is—is in excess of its jurisdiction. In my opinion, its judgment is absolutely void, subject to collateral attack, and ought to be annulled on *certiorari*." Sherer *v.* Superior Court, 96 Cal. 653; 31 Pac. Rep. 565.

[2] History Company *v.* Light, 97 Cal. 56; 31 Pac. Rep. 627; Buckley *v.* Superior Court, 96 Cal. 119; 31 Pac. Rep. 8.

[3] People *v.* Betts, 55 N. Y. 600. This case contains a brief review of the New York cases up to the time of its decision, and a brief statement of the offices of the writ of *certiorari* as announced in each of the cases referred to; which furnishes a clear exemplification of the uncertainties that have grown up respecting the purposes for which the writ may properly be used. This uncertainty is referred to in an earlier New York case, in which it is said:

"Doubtless the same question is again presented as upon the original

The common law writ is given a broader scope in many of the cases and made to extend to the review of errors of law and even to a consideration of the evidence.[1] A distinction is made, in this respect, however, in some of the cases between a court and a *quasi* judicial body such as a town board, it being held that in case of the latter the writ may be extended to the correction of errors and irregularities, but not in case of a court.[2] In others the distinction is made between courts which proceed summarily, and those which proceed according to the course of the common law.[3] And in either case the power of

appeal, in relation to the form of the remedy. The decisions of the courts, in relation to the office of a common law *certiorari* are so conflicting that it is quite impossible to say that any settled rule has ever been established in this state which has not been subsequently departed from. It is unnecessary to cite the cases, but I will observe that, according to the decisions in this court, such a writ will bring up so much of the evidence as is necessary to present the question of law upon which the relator relies to avoid the determination of the inferior tribunal. (People *v.* Goodwin, 1 Seld. 568; Albany Northern Railroad Company *v.* Brownell, 24 N. Y. 345.)" Baldwin *v.* City of Buffalo, 35 N. Y. 375, 380.

[1] Milwaukee Iron Co. *v.* Shubel, 29 Wis. 444, 447; 9 Am. Rep. 591; Dryden *v.* Swinburne, 20 W. Va. 89, 106; State *v.* Dodge County, 56 Wis. 79; 13 N. W. Rep. 680; State *v.* Whitford, 54 Wis. 150; 11 N. W. Rep. 424; Baldwin *v.* City of Buffalo. 35 N. Y. 375, 380; Swift *v.* City of Poughkeepsie, 37 N. Y. 511, 516; People *v.* Assessors, 40 N. Y. 154; Alderson *v.* Commissioners, 32 W. Va. 454; 9 S. E. Rep. 863.

[2] State *v.* Whitford. 54 Wis. 150; 11 N. W. Rep. 424; People *v.* Board of Police, 72 N. Y. 415.

[3] "The general rule is, that upon *certiorari* to an inferior court, the court from which the writ issues, will only inquire into errors and defects which go to the jurisdiction of the court below, and for all other errors or irregularities, the party must resort to his remedy by appeal or writ of error. This rule has been frequently applied when the writ is sent to a justice of the peace, but it is equally applicable to any case where the writ issues to a court which proceeds according to the course of the common law, whether of record or otherwise. Hauser *v.* The State, 33 Wis. 680. But in this state if the inferior tribunal proceeds in a summary manner, and not according to the course of the common law, and there is no remedy by appeal or writ of error, then the courts will consider other than jurisdictional questions. Cunningham *v.* Squires, 2 W. Va. 422; Dryden *v.* Swinburne. 20 Id. 89. However, the principle that if the inferior court had jurisdiction, mere errors in the exercise of that jurisdiction can not be corrected by *certiorari*, where

the court of errors is held not to extend to the determination of the weight of the evidence.[1]

As stated above the writ is usually denied where there is a speedy and adequate remedy by appeal, writ of error or other ordinary proceeding.[2] But the right to an appeal is not an absolute bar to the writ in all cases.[3] It is held that the writ will lie, unless taken away by the express words of the statute, not withstanding an appeal is allowed,[4] and in some of the states, in certain cases, appeal and *certiorari* are concurrent remedies. But under a statute authorizing the writ only, where there is no speedy and adequate remedy by appeal or writ of error, the writ will be denied, where the right of appeal exists, although the court to which the application is made is given general jurisdiction to issue the writ.[5]

Sometimes the writ is allowed to serve the purpose of a writ of error where the latter can not be resorted to and is used for the correction of errors of law ;[6] or where, in case an appeal or writ of error is allowed, the right has been lost without the fault of the applicant for the writ,[7] but not

there is any other available mode of redress, prevails very extensively. Doolittle *v.* Galena R. R. Co., 14 Ill. 381; Owens *v.* State, 27 Wis. 456." Poe *v.* Machine Works, 24 W. Va. 517, 520.

[1] State *v.* Whitford, 54 Wis. 150; 11 N. W. Rep. 424; State *v.* Dodge County, 56 Wis. 79; 13 N. W. Rep. 680; People *v.* Board of Police, 69 N. Y. 408; People *v.* Board of Police, 72 N. Y. 415; De Rochebrune *v.* Southeimer, 12 Minn. 78.

[2] Duggen *v.* McGruder, 12 Am. Dec. 531, note; Alabama G. S. R. Co. *v.* Christian, 82 Ala. 307; 1 Sou. Rep. 121.

[3] Duggen *v.* McGruder, 12 Am. Dec. 531, note.

[4] New Jersey R. R. & Tr. Co. *v.* Suydam, 17 N. J. Law, 25, 40.

[5] People *v.* Board of Supervisors, 2 N. Y. Supl. 555.

[6] People *v.* Court of Sessions, 45 Hun, 54; Case of Philadelphia, etc., R. R. Co., 6 Whar. (Pa.) 25; 36 Am. Dec. 202; Dryden *v.* Swinburne, 20 W. Va. 89, 105; 3 Am. & Eng. Enc. of Law, 61; Lessee of Walpole *v.* Ink, 9 Ohio, 142; People *v.* Board of Police, 69 N. Y. 408; Bostick *v.* Palmer, 79 Ga. 680; 4 S. E. Rep. 319; State *v.* Mayor, 32 N. J. Law, 365; Farmington River, etc., Co., *v.* County Commissioners, 112 Mass. 206, 212; Tewksbury *v.* County Commissioners, 117 Mass. 563.

[7] Briggs *v.* Jervis, 98 N. Car. 454; 4 S. E. Rep. 631; Burgett *v.* Apperson, 52 Ark. 213; 12 S. W. Rep. 559; Callanan *v.* Lewis, 79 Ia. 452; 44 N. W. Rep. 892.

where the loss of an appeal is brought about by the laches of the applicant for the writ and not by any act of the opposite party,[1] except upon such a showing as would be sufficient to relieve a party from the consequence of his own delay.[2]

In some of the states a party has his choice of remedies either to appeal for a new trial or prosecute a writ of *certiorari* to review such questions of law as may be presented by the writ,[3] in either of which cases it becomes a substitute for the writ of error or appeal, as the case may be, and is essentially the same, and serves the same purpose, and will raise the same questions as might properly be raised by the proceeding for which it is thus made a substitute.[4]

In other states it is expressly held that the writ can not be used as a substitute for an appeal where the time for taking the appeal has been suffered to elapse,[5] nor will the writ be allowed as a substitute for an appeal from an interlocutory order where an appeal from such an order is not allowed.[6]

At common law the writ issued from the court of chancery, or from the king's bench, or common pleas;[7] now its issuance is usually authorized by statute and its enforcement specially provided for. These statutory provisions, varying in their language, and the different constructions placed upon them by the courts, have led to

[1] Bowen *v.* Fox, 99 N. Car. 127; 5 S. E. Rep. 437; Cox *v.* Pruett, 109 N. Car. 487; 13 S. E. Rep. 917.

[2] Long *v.* Ohio River Co., 35 W. Va. 333; 13 S. E. Rep. 1010.

[3] Barclay *v.* Brabston, 49 N. J. L. 629; 9 Atl. Rep. 769.

[4] Case *v.* Philadelphia, etc., R. R. Co., 6 Whar. (Pa.) 25; 36 Am. Dec. 202; Dryden *v.* Swinburne, 20 W. Va. 89, 105; Lessee of Walpole *v.* Ink, 9 Ohio, 142.

[5] Faut *v.* Mason, 47 Cal. 7; McCue *v.* Superior Court, 71 Cal. 545; 12 Pac. Rep. 615; Stuttmeister *v.* Superior Court, 71 Cal. 322; In re Stuttmeister, 12 Pac. Rep. 270; Lewis *v.* Gilbert, 5 Wash. St. 534; 32 Pac. Rep. 459; Poe *v.* Machine Works, 24 W. Va. 517; Tomlinson *v.* Board of Equalization, 88 Tenn. 1; 12 S. W. Rep. 414.

[6] State *v.* Georgia Co., 109 N. Car. 310; 13 S. E. Rep. 861.

[7] Duggen *v.* McGruder, Walker (Miss.), 112; 12 Am. Dec. 527, 529, note.

great confusion as to the office of the writ and the extent to which it may be used. In some of the states the writ remains as it was at common law although defined expressly by statute;[1] in others the inquiry may go to the jurisdiction of the court and the validity of the judgment respecting the regularity, or form, of the proceedings, whether in accordance with the forms of law or not,[2] in some special provision is made for the reviewing of assessments for taxation; and in some questions of fact, not affecting the jurisdiction of the court, alone, may be determined under the writ.[3]

[1] People *v.* Board of Delegates, 14 Cal. 479, 500.

[2] State *v.* Rightor, 39 La. Ann. 619; 2 Sou. Rep. 385; Hyslop *v.* Finch, 99 Ill. 171; Donahue *v.* County of Will, 100 Ill. 94; Blair *v.* Sennott, 134 Ill. 78; 24 N. E. Rep. 969.

[3] Dryden *v.* Swinburne, 20 W. Va. 89, 105; People *v.* Board of Police, 72 N. Y. 415; People *v.* City of Brooklyn, 106 N. Y. 64; 13 N. E. Rep. 28; Alderson *v.* Commissioners, 32 W. Va. 454; 9 S. E. Rep. 863.

"According to the English practice, a writ of *certiorari* might issue as well before as after the decision of the case in the inferior court, and when sustained, the superior court commenced *de novo* and tried the case in the superior court without regard to what had been done in the inferior court. Thus the relief granted was in England much more comprehensive than the relief granted on a writ of error, which was confined to the correction of those errors of law which entered into and tainted the proceedings in the inferior court. We decided in this case, when formerly before us, in 15 West Va., p. 235, that this English practice was not the practice in this state and ought not to be followed; and, though not then decided, the inference to be drawn from the views then expressed by this court was, that the practice in this state should be in cases brought before a superior tribunal by writ of *certiorari* for the correction of errors in a final decision of an inferior tribunal similar to the practice, when cases were brought before a superior court by writ of error. We expressly decided that the judgment in the superior court, when the inferior court was rendered, should be alike; that is, in both cases, the superior court in such reversal should enter up such judgment, as the inferior court should have entered up, and, when necessary, remand the case to the inferior court for further proceedings. The errors, which in this state are corrected on a writ of error, are generally errors of law; and the juries and inferior tribunals are as a general rule held to be the sole judges of the weight of evidence, and their decisions on an issue of fact is rarely reversed or interfered with by the appellate court on a writ of error. It is true that the power in this state exists to grant a new trial on a writ of error, because the verdict is so contrary to the weight of evidence as to shock the conscience; and

The liberal doctrine declared in the cases holding that the writ of *certiorari* is even more comprehensive in its scope than a writ of error makes the former a substitute

the appellate court in this state probably exercises this power thus, as it were, in a qualified manner, to review what seems to be a question of fact to an extent to which it would not be exercised in some states—these states or some at least of them never reviewing a question of fact on a writ of error.

"Bearing in mind this diversity of practice in the different states, we may, I think, deduce from the decisions in *certiorari* cases, that the appellate court in cases brought before them by *certiorari* may review and correct the errors of the inferior court, not only when these errors are errors on questions of jurisdiction, power, and authority of the inferior tribunal, or on questions of the regularity of their proceedings, but also when there were any errors of law in their proceedings or any action taken by them on erroneous principles or in the absence of all evidence to justify it. In short, the appellate court may review and correct any error of the inferior court, when the case after its final decision is brought before it by writ of *certiorari*, whenever the error is of such a character, as that the appellate court would review and correct a similar error, were the case brought before it by writ of error. To sustain this position, we may refer to the following, among many other cases: Starr et al. *v.* Trustees, etc., 6 Wend. 564; Baldwin *v.* Calkins, 10 Wend. 167; State *v.* Mayor, 32 N. J. L. 367 (3d Vroom.); Græcen *v.* Allen, 14 N. J. L. 74 (2 J. S. Green); Hayward, Petitioner, etc., 10 Pick. 358; Nightingale, Petitioner, etc., 11 Pick. 168; Farmington River Water Power Co. *v.* County Commissioners, 112 Mass. 206; Hyde *v.* Nelson, 11 Mich. 357; De Rochebrune *v.* Southeimer, 12 Minn. 78; Frankfort *v.* County Commissioners, 40 Me. 391; Lapan *v.* County Commissioners, 65 Me. 160; People *v.* Board of Police, 69 N. Y. 411; People *v.* Smith, 45 N. Y. 776; City of St. Paul *v.* Marvin, 16 Minn. 104; The Minn. C. R. R. Co. *v.* McNamara, 13 Minn. 509.

"It is true there are some decisions that upon *certiorari* to an inferior court the appellate court will only inquire into errors or defects, which go to the jurisdiction of the court below. See Hauser *v.* The State, 33 Wis. 680. But even in Wisconsin, if there be no remedy by appeal, the courts will consider other than jurisdictional questions, Milwaukee Iron Co. *v.* Schubel, 29 Wis. 444; and it is very generally elsewhere held that, when there is any other available redress, a *certiorari* will not issue even to correct errors in the exercise of jurisdiction. In New York at one time it was held that the office of the writ of *certiorari* was only to bring up jurisdictional errors. See People *v.* Commissioners of Highways, 30 N. Y. 72. But it may be regarded probably as settled now in New York, though their decisions have been very contradictory, that, when there is no other available remedy, any law question may be considered and corrected on *certiorari* though it be not jurisdictional in its

for both the latter writ and an appeal. If this be the correct doctrine, all statutes providing for appeals are purely superfluous, as the right given by such statutes already exists without limitation or restraint.[1]

If, therefore, the right of appeal is given by statute in one class of cases and withheld in another, because it is believed the right should not be allowed in the latter class, the courts supply what the legislature has purposely withheld.[2] There are very few cases that have gone to this extent, and it is not likely that the number will increase. The doctrine has been modified in later cases by the same court in which the power to use the writ, even as a substitute for a writ of error, is confined to the review of proceedings of courts acting in a summary manner and not according to the course of the common law.[3]

But still later decisions have again broadened the scope of the writ, as the result, it is believed, of statutory pro-

character. People *v.* Assessors, 40 N. Y. 154; People *v.* Supervisors, etc., 51 N. Y. 442; People *v.* Allen, 52 N. Y. 538.

"Upon a review of the authorities, I conclude that a writ of *certiorari* issued by a superior court after final judgment of the inferior court brings up for review and correction not only errors and defects, which affect the jurisdiction of the inferior tribunal, but all errors of law in the record, including all action taken on evidence before it and on erroneous principles, or any action taken by it in the absence of all evidence to justify such action. This conclusion is sustained both by reason and the overwhelming weight of authority. It seems to me absolutely necessary that the principle stated should be acted upon, if we would not render of but little value a common-law writ, which was designed to afford redress, when wrongs were committed by inferior courts from want of a correct knowledge of legal principles, and when the common law furnished no other mode of redress. As it is, when there are errors in the record of the case, which are to be corrected, it becomes necessary to determine, in case brought up by *certiorari* for review, what constitutes the record, and especially do bills of exceptions, which have been signed, sealed, and made a part of the record, constitute a part of it, so as to authorize the superior court to look at them." Dryden *v.* Swinburne, 20 W. Va. 89, 105.

[1] State *v.* Perrault, 41 La. Ann. 179; 6 Sou. Rep. 18.

[2] Tomlinson *v.* Board of Equalization, 88 Tenn. 1; 12 S. W. Rep. 414.

[3] Poe *v.* Machine Works, 24 W. Va. 517.

visions intended to give the courts more extended powers under it.[1]

It is held that where it is provided that the judgment of a court shall be final a writ of *certiorari* will not lie for the correction of errors, as such a statute bars the writ so far as it can be used for such a purpose, as well as an appeal or writ of error.[2]

It is held that the writ may be used to annul an order of dismissal made upon the ground that the court making the order has not jurisdiction of the action and to reinstate the case.[3] But this is certainly a very peculiar application of such a writ. In such a case *mandamus* to compel the court having jurisdiction to proceed with the action is the most appropriate remedy and the one usually applied.[4]

It is true that the right to compel a court to act where it has decided that it has not jurisdiction, and refuses to proceed, upon that ground, has been disputed.[4] But if the writ of *mandamus* will not lie under such circumstances certainly *certiorari* will not in a state where the latter is uniformly held to be a purely jurisdictional writ. If the decision of the lower court in dismissing the action is an error, only, in the one case, and held to be reviewable only by writ of error or appeal, it is in the other.[5] And in any event the remedy by *certiorari* can only go to the extent of annulling the order and can not be used to require the reinstatement of the case or any other affirmative action by the lower court.[6]

A writ, by the same name, is allowed to bring up a part of the record upon a showing of diminution of the record

[1] Alderson *v.* Commissioners, 32 W. Va. 454; 9 S. E. Rep. 863; Long *v.* Ohio River Co., 35 W. Va. 333; 13 S. E. Rep. 1010.

[2] People *v.* Betts, 55 N. Y. 600.

[3] Hall *v.* Superior Court, 71 Cal. 550; 12 Pac. Rep. 672; Carlson *v.* Superior Court, 70 Cal. 628; 11 Pac. Rep. 788.

[4] *Ante*, sec. 80.

[5] This inconsistency in the California cases has been removed by the later decisions by which the cases cited have been overruled. Buckley *v.* Superior Court, 96 Cal. 119; 31 Pac. Rep. 8; History Company *v.* Light, 97 Cal. 56; 31 Pac. Rep. 627.

[6] People *v.* Supervisors, 51 N. Y. 442.

where the action is pending in a superior court on appeal or writ of error,[1] in which case it is an auxiliary writ in aid of the appellate jurisdiction of the court of errors. In some of the states the writ is abolished and other remedies provided to take its place.[2]

The writ is frequently used in connection with the writ of *habeas corpus* to bring up the record of proceedings which are the basis of the imprisonment, for the inspection of the court, with a view to determine whether the party under detention is legally in custody or not.[3]

There are bills of *certiorari* also in the chancery practice, the object of which is to remove a suit from an inferior to a superior court, but it is not now in use.[4] And it is generally held that *certiorari* is not a proper mode of reviewing a proceeding in equity.[5]

Under this anomalous state of the law in the different states it may almost be said that the writ of *certiorari*, as a distinctive writ, has ceased to exist.

The writ brings up for the review of the higher court the entire record of the proceedings had before the inferior tribunal, officer, or board, which, under the practice in most of the states, constitutes the return to the writ.[6]

The general rule is that the question to be determined must be tried by the record,[7] that the record is conclu-

[1] Bergen *v.* Riggs, 40 Ill. 61; 89 Am. Dec. 335; Elliott's App. Pro., sec. 216.

[2] Ex parte Collier, 6 Ohio St. 55, 60.

[3] State *v.* Neel, 48 Ark. 283; 3 S. W. Rep. 631; Grieb *v.* Kuttner, 135 Pa. St. 281; 19 Atl. Rep. 1040; Ex parte Virginia, 100 U. S. 339.

[4] Story's Eq. Pl., sec. 298.

[5] Gilliland *v.* Sellers, 2 Ohio St. 223; Galloway *v.* Stophlet, 1 Ohio St. 434.

[6] Fraser *v.* Freelon, 53 Cal. 644; Donahue *v.* County of Will, 100 Ill. 94; State *v.* Washoe Co., 7 Nev. 83; Drainage Commissioners *v.* Giffin, 134 Ill. 330; 25 N. E. Rep. 995.

[7] Cassidy *v.* Millerick, 52 Wis. 379; 9 N. W. Rep. 165; Smith *v.* Bahr, 62 Wis. 244; 22 N. W. Rep. 438; Frazer *v.* Freelon, 53 Cal. 644; Grieb *v.* Kuttner, 135 Pa. St. 281; 19 Atl. Rep. 1040; Donahue *v.* County of Will., 100 Ill. 94; Blair *v.* Sennott, 134 Ill. 78; 24 N. E. Rep. 969; Hyslop *v.* Finch, 99 Ill. 171; Miller *v.* Trustees, 88 Ill. 26; Alexander *v.* Archer, 21 Nev. 22; 24 Pac. Rep. 373; Hann. & St. Joe R. R. Co. *v.* State Board,

sive,[1] and that questions of fact can not be tried under the writ.[2] But if the jurisdiction of the court depends upon the evidence taken before it, or other documents, the evidence or such documents is a necessary part of the record, must be certified up, and may be considered by the reviewing court.[3] And in some of the states the power to determine the weight, or sufficiency, of the evidence in certain cases is given by statute.[4]

A distinction is made in some of the cases between the proceedings of courts and those of boards and officers, not strictly of a judicial character, and out of the course of the common law, it being held that in case of the former the evidence can not be examined to determine whether the court had jurisdiction or not, but in case of the latter the evidence may be looked to for that purpose.[5] And in some of the states evidence may be taken to determine whether the court had jurisdiction or not.[6] And under a practice which permits a trial *de novo* in the higher court, the trial is not by the record.

In some of the states the hearing is not confined to the

64 Mo. 294; In re Chestnut Street, 118 Pa. St. 593; 12 Atl. Rep. 585; Drainage Commissioners *v.* Giffin, 134 Ill. 330; 25 N. E. Rep. 995; Wilmington S. S. Co. *v.* Haas, 151 Pa. St. 113; 25 Atl. Rep. 85.

[1] Duggen *v.* McGruder, 12 Am. Dec. 536, note; Cassidy *v.* Millerick, 52 Wis. 379; 9 N. W. Rep. 165; 22 N. W. Rep. 438; Alexander *v.* Archer, 21 Nev. 22; 24 Pac. Rep. 373; People *v.* Fire Commissioners, 73 N. Y. 437; Rutland *v.* County Commissioners, 37 Mass. 71; Hann. & St. Joe R. R. Co. *v.* State Board, 64 Mo. 294; Appeal of Long, 134 Pa. St. 641; 19 Atl. Rep. 806; Healy *v.* Kneeland, 48 Wis. 497; 4 N. W. Rep. 586.

[2] Jackson *v.* People, 9 Mich. 111; 77 Am. Dec. 491; Cassidy *v.* Millerick, 52 Wis. 379; 9 N. W. Rep. 165; State *v.* Mayor, 32 N. J. Law, 365; Stewart *v.* Patterson, 14 N. J. Law, 141; Farmington River, etc., Co. *v.* County Commissioners, 112 Mass. 206, 212; Tewksbury *v.* County Commissioners, 117 Mass. 563; Hayward, Petitioner, 27 Mass. 359; Carver *v.* Chapel, 70 Mich. 49; 37 N. W. Rep. 879; Commonwealth *v.* Gillespie, 146 Pa. St. 546; 23 Atl. Rep. 393; Wilmington S. S. Co. *v.* Haas, 151 Pa. St. 113; 25 Atl. Rep. 85.

[3] People *v.* Board of Delegates, 14 Cal. 479; People *v.* Goodwin, 5 N. Y. 568; State *v.* Washoe Co., 7 Nev. 83.

[4] People *v.* French, 119 N. Y. 502; 23 N. E. Rep. 1061.

[5] Callon *v.* Sternberg, 38 Wis. 539.

[6] Lonsdale Co. *v.* Board, etc., 25 Atl. Rep. 655.

matters presented by the return, but extends to papers upon which the writ was granted as provided by statute.[1] And the extent to which the courts may go under the statutes of some of the states, and the differences in such statutes, in this respect, render it impossible to lay down any rule with respect to the power of the courts to go outside of the record in the determination of questions presented by the writ. Where the writ is allowed as a substitute for a writ of error, there is some reasonable certainty as to the scope of the investigation and the conclusiveness of the record;[2] but under some of the statutes the powers of the courts seem to be so nearly unlimited as to be beyond definition.[3] The record can not be amended in the higher court,[4] but may be amended in the court below and brought up as amended.[4] It is not a writ of right except when issued at the instance of the king or the people, unless made so by statute;[5] can not be issued by the clerk without an order of court;[5] runs only to courts, tribunals, or officers, exercising judicial or *quasi* judicial functions;[7] and the act to be reviewed must be judicial in its nature,[8] and not ministerial,[9] or legislative.[10] It is held, however, that

[1] People *v.* City of Brooklyn, 106 N. Y. 64; 12 N. E. Rep. 641.

[2] *Ante*, sec. 85.

[3] Duggen *v.* McGruder, 12 Am. Dec. 532, note.

[4] Bergen *v.* Riggs, 40 Ill. 61; 89 Am. Dec. 335.

[5] 3 Am. and Eng. Enc. of Law, 62; Matter of Lantis, 9 Mich. 324; 80 Am. Dec. 85; Duggen *v.* McGruder, Walker (Miss.), 112; 12 Am. Dec. 527, 530, note; Gaither *v.* Watkins, 66 Md. 576; 8 Atl. Rep. 464; Burgett *v.* Apperson, 52 Ark. 213; 12 S. W. Rep. 559.

[6] Gaither *v.* Watkins, 66 Md. 576; 8 Atl. Rep. 464.

[7] Duggen *v.* McGruder, 12 Am. Dec. 535, note; Mayor *v.* Morgan, 7 Martin N. S. (La.), 1; 18 Am. Dec. 232, 236, note; In re Saline Co. Sub., 45 Mo. 52; 100 Am. Dec. 337; Spring Valley Water Works *v.* Bryant, 52 Cal. 132; People *v.* Hester, 6 Cal. 680; Drainage Commissioners *v.* Giffin, 134 Ill. 330; 25 N. E. Rep. 995.

[8] In re Saline Co. Sub., 45 Mo. 52; 100 Am. Dec. 337; People *v.* Bush, 40 Cal. 344; Spring Valley Water Works *v.* Bryant, 52 Cal. 132.

[9] People *v.* Bush, 40 Cal. 344.

[10] Mayor *v.* Morgan, 18 Am. Dec., 236, note; Spring Valley Water Works *v.* Bryant, 52 Cal. 132; Lemont *v.* County Commissioners, 39

the acts of a municipal corporation may be reviewed by the writ, whether such acts are judicial or legislative;[1]

Minn. 385; 40 N. W. Rep. 359; Moode *v.* Board of County Commissioners, 43 Minn. 312; 45 N. W. Rep. 435.

[1] City of Camden *v.* Mulford, 26 N. J. Law, 49.

"In the case of Tucker *v.* The Freeholders of Burlington, Saxton, 287, Vroom, Chancellor, said: 'The principle is universal, that wherever the rights of individuals are invaded by the authority of persons clothed with authority to act, and who exercise that authority illegally, the persons aggrieved must seek redress by *certiorari*. It appertains to the general supervisory jurisdiction of the supreme court, exercising in that behalf the powers of the king's bench to correct abuses of that character. The same broad principle is stated and approved in Lawton *v.* The Commissioners of the Highways of Cambridge, 2 Caines' R. 182; Wildy *v.* Washburn, 16 Johns. R. 49; Le Roy *v.* The Corporation of New York, 4 Johns. Ch. R. 356.

"And although it may be true that this statement of the principle is too broad and includes within its terms a class of wrongs which are clearly not the subject of relief by *certiorari*, the principle can not be limited, as is attempted to be done in the matter of Mount Morris Square, 2 Hill, 32, to a mere review of judicial decisions. It is certain that in this state the remedy has been extended to wrongs inflicted upon individuals, whether by judicial decision, by corporate acts, or by the acts of special jurisdictions created by statute.

"Thus it is habitually used as a remedy against unlawful taxation, either for state, county, township or city purposes; and while the remedy has been denied in other states as dangerous or prejudicial to the public welfare, no such evil has been experienced from the use of the remedy, while it has been found eminently salutary and efficacious as a protection to private rights against oppressive and illegal taxation.

"It is used to test the legality of an election, State *v.* Justices of Middlesex, Coxe, 244; State *v.* Anderson, Coxe, 318; to test the validity of a by-law of a municipal corporation, State *v.* Corporation of New Brunswick, Coxe, 393; to test the validity of the classing and assessing of the militia under the militia act of 1794, State *v.* Chambers, Coxe, 400; to review the return list of delinquents, and executions issued for the collection of fines imposed for neglect of militia duty, State *v.* Kirby, 1 Halst. 143; State *v.* Atkinson, 4 Halst. 271; the laying out of a road under an act incorporating a turnpike company, State *v.* Newark and Pompton Turnpike Co., 1 Penn. 338; the appointment and proceedings of commissioners appointed to value lands taken by corporations for their use, and to appraise damages by special statutory authority, The State *v.* The Morris Canal, 7 Halst. 365; 2 Green, 411; Bennett *v.* Railroad Co., 2 Green, 151; Van Wickle *v.* Railroad Co., 2 Green, 164; Smith *v.* The Trenton Delaware Falls Co., 2 Harr. 5.

"One of the most familiar uses of the writ is to test the validity of the proceedings of surveyors and freeholders in laying out and confirm-

but this is an exception to the general rule that can hardly be supported, in principle, or by any very satisfactory reasons. Cases can be found in which it is held, or seems to be held, that *certiorari* is proper where, and because, the act complained of is not judicial, thus reversing the general rule on the subject.[1] This is held on the ground that not being a judicial act no appeal would lie, and therefore *certiorari* must be allowed.

If the act is ministerial it makes no difference that it was performed by a judicial officer.[2]

The writ can not be used to contest the legal existence of a corporation.[3]

While the issuance of the writ is within the discretion of the court the discretion is a legal and not an arbitrary one, and may be reviewed by writ of error or appeal.[4]

One of the most usual statutory limitations upon the power of the courts to issue the writ is as to the time when it may issue. This is a limitation that the legislature may enforce. But this is subject, as in other cases, to the power of the courts to relieve a party from a failure to act in time, resulting from the fraud or other wrongful

ing of public highways; though, according to some of the authorities, the laying out of streets and highways is the mere exercise of municipal or corporate power without the semblance of judicial decision.

"These instances are sufficient to show that the writ of *certiorari* has long been used in this state to test the validity of the acts of corporations and of special tribunals not judicial in their character.

"In the case of The State *v.* The Corporation of New Brunswick, the eminent counsel of the city did not question the right of a corporator, by writ of *certiorari*, to remove and try the validity of a by-law of a corporation. They insisted that the court ought not to award the writ on the prayer of an individual, without showing that he is or may be affected by the operation of the by-law, and is therefore entitled to question its validity. But the court held that a sufficient ground for the allowance of the writ was shown, the court being informed that a question as to the validity of the law was intended to be brought before them for adjudication, and that the prosecutor had been injured by the law." City of Camden *v.* Mulford, 26 N. J. Law, 49, 54.

[1] Champion *v.* Board of County Commissioners, 5 Dak. 416; 41 N. W. Rep. 739.

[2] People *v.* Bush, 40 Cal. 344. [3] State *v.* Brown, 31 N. J. Law, 355.

[4] Welch *v.* County Court, 29 W. Va. 63; 1 S. E. Rep. 337.

act of his adversary, or from mistake, accident or excusable neglect. And it has been held that such a statute is not a limitation upon the discretionary and inherent power of the court to relieve a party through the writ.[1]

The right to the writ may be lost by unreasonable delay in asking for it independently of any statutory limitation.[2]

The writ operates as a *supersedeas* and suspends all proceedings in the lower court or other tribunal.[3]

In the absence of some provision of law expressly authorizing it the writ can not be issued by a judge at chambers, but must be issued by the court in term time.[4]

The usual judgment where the proceedings are found to be without authority is, that the proceedings be quashed or annulled; and the court has jurisdiction to annul a part of the judgment of the lower court where it is found to be void, and such invalid portion of the judgment is so disconnected with that which is found to be valid that they are not interdependent.[5]

87. Bills, and Writs, of Review.—A bill of review, in a court of equity, is similar to a writ of error in a court of law, and may be brought for error of law, appearing upon the face of the record.[6]

[1] Matter of Lantis, 9 Mich. 324; 80 Am. Dec. 85.

[2] Smith *v.* Superior Court, 97 Cal. 348; 32 Pac. Rep. 322.

[3] Hunt *v.* Lambertville, 46 N. J. Law, 59.

[4] State *v.* Black, 34 S. Car. 194; 13 S. E. Rep. 361.

[5] Shafer *v.* Hogue, 70 Wis. 392; 35 N. W. Rep. 928.

[6] Story's Eq. Pl., secs. 403–411; 2 Am. & Eng. Enc. of Law, 262, 264; 1 Black on Judg., sec. 301; Whiting *v.* Bank of the United States, 13 Pet. 6; Barton's Suit in Equity, 154; Foster's Fed. Prac., sec. 354, p. 518.

"There are but two cases in which a bill of review is permitted to be brought, and these two cases are settled and declared by the first of the ordinances in chancery of Lord-Chancellor Bacon, respecting bills of review, which ordinances have never since been departed from. It is as follows: 'No decree shall be reversed, altered or explained, being nceo under the great seal, but upon bill of review. And no bill of review shall be admitted, except it contain either error in law, appearing in the body of the decree, without further examination of matters in fact, or some new matter, which hath arisen in time after the decree, and not any new proof, which might have been used, when the decree was made. Nevertheless, upon new proof, that is come to light after the

Where the writ is for error of law, the question must be determined by the record, as in the case of a writ of error, and the evidence can not be resorted to.[1]

The bill lies also upon the discovery of new matter.[2] Such bills are allowed only where the decree is enrolled,[3] and therefore can not be resorted to until after final decree.[4]

The appropriate remedy for the review of decrees not enrolled was by bill in the nature of a bill of review,[5] and its office was to bring before the court new matter discovered since the publication in the original cause.[6]

There are also bills for the impeachment of decrees for fraud.[7]

This proceeding by bill of review, or by bill in the nature of a bill of review, has fallen into disuse in most of the state s,having been superseded, very generally, by other remedies provided by statute. In some of the states the writ of error has been extended so as to be available to review decrees in equity as well as judgments at law.[8]

Under the codes of many of the states the writ of *certiorari* is made applicable to all civil actions, which include what would have been suits in equity under the former practice.

In some of the states the writ of review is provided for

decree was made, which could not possibly have been used at the time when the decree passed, a bill of review may be grounded by the special license of the court, and not otherwise.' So that, from this ordinance, a bill of review may be brought, first, for error of law; secondly, upon discovery of new matter." Story's Eq. Pl., sec. 404.

[1] Whiting *v.* Bank of the United States, 13 Pet. 6; Barton's Suit in Eq. 154.

[2] Story's Eq. Pl., sec. 412; 2 Am. & Eng. Enc. of Law, 266.

[3] Story's Eq. Pl., sec. 412; Whiting *v.* Bank of the United States, 13 Pet. 6.

[4] Story's Eq. Pl., sec. 408a; 2 Am. & Eng. Enc. of Law, 263; 1 Black on Judg., sec. 301.

[5] Story's Eq. Pl., sec. 412; Whiting *v.* Bank of the United States, 13 Pet. 6; Foster's Fed. Prac., sec. 353, p. 517.

[6] Story's Eq. Pl., secs. 364, 425.

[7] Story's Eq. Pl., sec. 426; Barton's Suit in Eq. 157.

[8] *Ante*, sec. 85.

and becomes a statutory remedy to be governed by the provisions of the statutes creating them and regulating their use,[1] and under some of these statutes parol proof may be heard to establish the ground of objection to the judgment in some cases.[2]

In some of the states the writ of *certiorari* is denominated a writ of review, and is so called in the decided cases;[3] and is confined to the question of the jurisdiction of the court and the validity of the judgment, and does not extend to mere errors or irregularities,[4] or to matters appearing on the face of the record,[5] and not to questions of fact;[5] and is confined to cases in which no speedy and adequate remedy by appeal or otherwise can be had.[6]

The jurisdiction in proceedings by *certiorari* has been considered.[7] What is said on that subject is applicable to the writ of review, as it exists in those states in which it is made to take the place of the former writ, or is treated as the same writ by another name.

Again, in some of the states an action by complaint is provided for by which errors of law and the discovery of material new matter may be made the grounds of complaint, and by which a judgment or decree, without distinction as to its being legal or equitable, may be re-

[1] Quinn *v.* Brennan, 148 Mass. 562; 20 N. E. Rep. 184; Sylvester *v.* Hubley, 157 Mass. 306; 32 N. E. Rep. 166; McNamara *v.* Carr, 84 Me. 299; 24 Atl. Rep. 856; Skillings *v.* Massachusetts Ben. Assn., 155 Mass. 581; 30 N. E. Rep. 367; Riley *v.* Hale, 146 Mass. 465; 16 N. E. Rep. 276.

[2] McNamara *v.* Carr, 84 Me. 299; 24 Atl. Rep. 856.

[3] Saunders *v.* Sioux City Nursery, etc., Co., 6 Utah, 431; 24 Pac. Rep. 532; Kearns *v.* Follansby, 15 Or. 596; 16 Pac. Rep. 478; Reagan *v.* Justices Court, 75 Cal. 253; 17 Pac. Rep. 195; Union County *v.* Slocum, 16 Or. 237; 17 Pac. Rep. 876.

[4] *Ante*, sec. 86; Saunders *v.* Sioux City Nursery, etc., Co., 6 Utah, 431; 24 Pac. Rep. 532.

[5] Barton *v.* City of La Grande, 17 Or. 577; 22 Pac. Rep. 111.

[6] *Ante*, sec. 86; Ramsey *v.* Pettingill, 14 Or. 207; 12 Pac. Rep. 439; Rogers *v.* Hayes, 32 Pac. Rep. 259; Barton *v.* City of La Grande, 17 Or. 577; 22 Pac. Rep. 111.

[7] *Ante*, sec. 86.

viewed,[1] which conforms very nearly to the equitable bill of review.

A distinction is made between newly discovered evidence and the discovery of material new matter, it being held that the former is not ground for review under the statute.[2]

A newly enacted statute affecting the rights of the parties is not new matter within the meaning of the law.[3]

It is held that a decree of divorce can not be reviewed by this statutory proceeding.[4]

Where the complaint is based upon errors of law, so much of the record as will fully exhibit the error complained of must be set out, and it must appear that proper exceptions to the rulings complained of were taken;[5] and if the error has been waived by failure to except, or otherwise, the review can not be had.[6] The error must be such that the cause would be reversed on appeal.[7]

The action thus provided for differs from an action to annul a judgment, and is in all material respects the same as a writ of error as respects the ground upon which it may be maintained.[8]

[1] Nealis *v.* Dicks, 72 Ind. 374; Hill *v.* Roach, 72 Ind. 57; Floyd Co. Agr. Ass'n. *v.* Tompkins, 23 Ind. 348; Evansville, etc., R. R. Co. *v.* Maddux, 33 N. E. Rep. 345.

[2] Roush *v.* Layton, 51 Ind. 106; Hall *v.* Palmer, 18 Ind. 5; Nelson *v.* Johnson, 18 Ind. 329.

[3] Worley *v.* Town of Ellettsville, 60 Ind. 7.

[4] Earle *v.* Earle, 91 Ind. 27.

[5] Goar *v.* Cravens, 57 Ind. 365; Stevens *v.* City of Logansport, 76 Ind. 498; Cain *v.* Goda, 84 Ind. 209; McDade *v.* McDade, 29 Ind. 340; Davidson *v.* King, 51 Ind. 224; Evansville, etc., R. R. Co. *v.* Maddux, 33 N. E. Rep. 345.

[6] Richardson *v.* Howk, 45 Ind. 451; Collins *v.* Rose, 59 Ind. 33.

[7] Rice *v.* Turner, 72 Ind. 559; Evansville, etc., R. R. Co. *v.* Maddux, 33 N. E. Rep. 345.

[8] Willman *v.* Willman, 57 Ind. 500; Cain *v.* Goda, 84 Ind. 209; Nealis *v.* Dicks, 72 Ind. 374.

"Properly considered, a proceeding to review a judgment presupposes the existence of a valid and subsisting judgment, which may, on the hearing, be affirmed, reversed, or modified, either in whole or in part, as the justice of the case may require, and is prosecuted on the theory that there is such a valid and subsisting judgment which ought to be

The remedy by action to review does not supersede or take away the jurisdiction of the courts to set aside and annul judgments procured by fraud or such as are wholly void, and upon grounds not mentioned in the statute as grounds for review.[1]

The action to review, thus provided for, is brought in the court in which the judgment sought to be reviewed was rendered; and a party may resort to this remedy or appeal, at his option, but he can not prosecute both remedies at the same time.[2] But he is not wholly deprived of his remedy by appeal, in the end, as he may, if the decision is against him in the proceeding for review, prosecute an appeal from that decision.[3] If, however, the proceeding to review is sustained, it is not a final disposition of the original case, but is equivalent to a reversal of the action on appeal to a higher court;[4] but the judgment is final as respects the proceeding to review, and is subject to appeal whether it affirms or reverses the original judgment.[5]

The prosecution to final judgment of a proceeding to review bars an appeal.[6] The proceeding can not be used to relieve a party from a judgment taken against him on the ground that the attorney who appeared for him acted without authority,[7] nor is it applicable to an *ex parte* proceeding by a guardian for the sale of the real estate of his ward,[8] nor can it be used to review a judgment or decision of a court or judge thereof, in vacation, growing out of

reversed or modified. An action to annul and set aside a void judgment, although it may have the form and similitude of a proceeding for the review of the judgment, is, nevertheless, not such a proceeding in strictly legal contemplation. It is proper to observe this distinction in the consideration of such cases as the one before us." Willman *v.* Willman, 57 Ind. 500, 503.

[1] *Ante*, sec. 84; Nealis *v.* Dicks, 72 Ind. 374.

[2] Dunkle *v.* Elston, 71 Ind. 585; Klebar *v.* Town of Corydon, 80 Ind. 95.

[3] Dunkle *v.* Elston, 71 Ind. 585.

[4] Leech *v.* Perry, 77 Ind. 422.

[5] Brown *v.* Keyser, 53 Ind. 85; Keepfer *v.* Force, 86 Ind. 81.

[6] Traders' Ins. Co. *v.* Carpenter, 85 Ind. 350.

[7] Floyd Co. Agr. Ass'n *v.* Tompkins, 23 Ind. 348.

[8] Davidson *v.* Lindsay, 16 Ind. 186.

any matter connected with the settlement of a decedent's estate.[1]

Under the codes, by which all distinctions in practice and pleading, and the forms of procedure are abolished, all final judgments or decrees, legal or equitable, are subject to review in the same way. And under the code practice this is not done by bill of review, so denominated, although the action provided for, and the writ of review, serve the same purpose. But the chancery proceeding for review has not been abolished in all of the states, either expressly, or by the creation of other remedies to take its place, but is still maintained under its original name,[2] and the remedy is still applied in the federal courts.[3] A court of concurrent jurisdiction with the one rendering the judgment can not entertain a proceeding to review the same.[4] A decree upon a bill of review can not be again reviewed in a second bill of review.[5]

88. APPEALS. Most of the material questions affecting the jurisdiction of appellate courts have been considered in other sections of this work.[6]

[1] McCurdy *v.* Love, 97 Ind. 62.

[2] Davis Sewing Machine Co. *v.* Dunbar, 32 W. Va. 335; 9 S. E. Rep. 237; Lorentz *v.* Lorentz, 32 W. Va. 556; 9 S. E. Rep. 886; Aholtz *v.* Durfee, 122 Ill. 286; 13 N. E. Rep. 645; Prentiss *v.* Paisley, 25 Fla. 927; 7 Sou. Rep. 56; Dodge *v.* Northrop, 85 Mich. 243; 48 N. W. Rep. 505; Greer *v.* Turner, 47 Ark. 17; 14 S. W. Rep. 383; Cox *v.* Lynn, 138 Ill. 195; 29 N. E. Rep. 857; Curry *v.* Peebles, 83 Ala. 225; 3 Sou. Rep. 622; Mitchell *v.* Hardie, 84 Ala. 349; 4 Sou. Rep. 182.

[3] Kimberly *v.* Arms, 40 Fed. Rep. 548; Foster's Fed. Prac., sec. 353 et seq.

[4] Dodge *v.* Northrop, 85 Mich. 243; 48 N. W. Rep. 505.

[5] Strader *v.* Heirs of Byrd, 7 Ohio, 184.

[6] See, as to the different kinds of jurisdiction, *ante*, sec. 9; jurisdiction as to amount, as it affects appellate courts, sec. 16, p. 64; original and appellate jurisdiction, sec. 21; how question of jurisdiction may be raised in an appellate court, sec. 22, pp. 112, 114, 118; how jurisdiction may be lost, taken away, or suspended by appeal or writ of error, sec. 24, p. 150; inherent powers of courts, sec. 27; effect of appeal as a waiver of service of process, sec. 34, p. 229; see, also, the sections on the various writs by which proceedings of inferior courts are enforced, prevented, and reviewed, viz., injunctions, sec. 79; *mandamus*, sec. 80;

Therefore, but little further need be said in this connection. The right is said to have had its origin in the civil law and to have been introduced therefrom into equity, admiralty, and ecclesiastical proceedings, and from thence to common-law proceedings to which it was formerly unknown.[1] And in the federal courts, and in some of the states, appeal is still the proper remedy for the review of equity cases.[2] But, whether applied to equity, admiralty, ecclesiastical, or common-law proceedings, it may properly be regarded at the present day as wholly statutory, as it is provided for, prescribed, limited, controlled, and governed in its exercise and use by constitutional and statutory provisions which, as we shall see directly, must be observed or the remedy is lost;[3] and, as the statutes of the several states differ, it would be impossible, in a general work of this character, to enter into any consideration of such statutes. The most that can be done here is to deal with general principles applicable to all statutes, leaving specific statutory regulations affecting the right, to be sought in the various local works in which

prohibition, sec. 81; *habeas corpus*, sec. 82; *quo warranto*, sec. 83; writs of error, sec. 85; *certiorari*, sec. 86; and writs of review, sec. 87; also new trials and vacation of judgments, sec. 84; and as to the right of appeal in contempt proceeding, *ante*, sec. 72; In re Deaton, 105 N. Car. 59; 11 S. E. Rep. 244; and in divorce cases, *ante*, sec. 73.

[1] 1 Am. & Eng. Enc. of Law, 616; Wiscart *v.* Dauchy, 3 Dall. 321; The San Pedro, 2 Wheat. 132.

"1. *Civil.* The removal of a cause from an inferior to a superior court. It was a civil-law proceeding in its origin, and was introduced therefrom into equity, admiralty, and ecclesiastical proceedings, to which it is chiefly confined, and from thence by statute into our common-law proceedings, and to which it was originally unknown. In order, therefore, that an appeal may be sustained, the right of the party to appeal must clearly appear, and it is consequently lost by any failure to comply with the statutory regulations. Appeals are distinguished from writs of error in that the former subject both the facts and the law to a re-examination, while the latter is confined to a re-examination or review of questions of law." 1 Am. & Eng. Enc. of Law, 616.

[2] Idaho, etc., Co. *v.* Bradbury, 132 U. S. 509; 10 Sup. Ct. Rep. 177; Hayes *v.* Fischer, 102 U. S. 121; Surgett *v.* Lapice, 8 How. 48.

[3] The San Pedro, 2 Wheat. 132; People *v.* Richmond, 16 Colo. 274; 26 Pac. Rep. 929; Lyons *v.* Lyons, 18 Cal. 448.

the subject is treated. Formerly, the remedy by appeal was regarded as the appropriate means by which to review questions of fact, as well as of law,[1] as distinguished from the various writs by which questions of law were open to review by an appellate court, and particularly the writ of error;[2] and in many of the states the right of appeal has been extended to questions of law and all other questions which might formerly be raised by any of the common-law writs by which the proceedings of inferior courts were subject to review.[3]

Not only so, but in many of the states the remedy by appeal has been made practically the exclusive method for the review of the proceedings of lower courts for errors of law and fact;[3] the writ of error being expressly abolished in some of the states;[4] and writs of *certiorari* and other writs of like, or similar, nature intended to review the proceedings of such courts on account of errors committed, or even for want of jurisdiction, in some of the states, are allowed only where no appeal is provided for.[5] But such statutes do not change the remedy, but provide another means by which it may be obtained and the form and manner of seeking the relief. Therefore, under such statutes, questions of law may be reviewed as they were by the different writs of review, but under a proceeding differing in name and form.[3]

Under the equity practice the appellate court had the power to look into the whole case, including the evidence, and decide it upon the merits.[3] But the tendency of legislation and decided cases has been to restrict this power, and in many of the states the appellate courts are strictly courts of errors, in equity as well as in common law cases,

[1] 1 Am. & Eng. Enc. of Law, 616; Wiscart *v.* Dauchy, 3 Dall. 321, 327; Appeal of Long, 134 Pa. St. 641; 19 Atl. Rep. 806; Stinger *v.* Roeder, 3 Wash. St. 412; 29 Pac. Rep. 211; Reed *v.* Nixon, 36 W. Va. 681; 15 S. E. Rep. 416.

[2] 1 Am. & Eng. Enc. of Law, 616; Wiscart *v.* Dauchy, 3 Dall. 321, 327.

[3] Appeal of Long, 134 Pa. St. 641; 19 Atl. Rep. 806.

[4] *Ante*, secs. 21, 85; Appeal of Long, 134 Pa. St. 641; 19 Atl. Rep. 806.

[5] *Ante*, secs. 79, 80, 81, 85, 86, 87.

and can not pass upon the mere weight of the evidence or the merits of the controversy.

Appeals for the removal of causes to a superior court for trial *de novo* are unknown to the common law, and can only be prosecuted where they are expressly authorized by statute,[1] but it is given in most of the states from courts of inferior jurisdiction, such as justices of the peace and similar courts. Appellate jurisdiction is frequently given by constitutional provisions, and when so given can not be taken away by statute.[2] But in order to make the jurisdiction thus given available, legislation may still be necessary.[3]

Where the court is given jurisdiction, but the means of taking the appeal, or the mode of procedure, has not been provided by statute, the court has inherent power to provide therefor, by its own rules, in order to render such jurisdiction effectual.[4]

Appeal is not the proper remedy for the removal of a cause from a state court to the supreme court of the United States. The remedy is by writ of error.[5]

From territorial courts the case may, in cases of trial by jury, be removed by writ of error, and in all other cases by appeal.[6]

The remedy by appeal being statutory, it must be sought within the time and in the manner provided by the statute in the particular case or it is wholly lost;[7] and an appeal is no more effective when taken too soon than when taken too late.[8]

[1] Schooner Constitution *v.* Woodworth, 1 Scam. (Ill.) 511.

[2] *Ante*, sec. 66. [3] Ohio & Miss. R. Co. *v.* Lawrence Co., 27 Ill. 49.

[4] People *v.* Jordan, 65 Cal. 644; 4 Pac. Rep. 683.

[5] Verden *v.* Coleman, 22 How. 192; Foster's Fed. Prac., sec. 405.

[6] Idaho, etc., Co. v. Bradbury, 132 U. S. 509; 10 Sup. Ct. Rep. 177.

[7] *Ante*, sec. 21; 1 Am. & Eng. Enc. of Law, 621; Briggs *v.* Barker, 145 Mass. 287; 13 N. E. Rep. 907; Gruell *v.* Spooner, 71 Cal. 493; 12 Pac. Rep. 511; Thompson *v.* White, 76 Cal. 381; 18 Pac. Rep. 399; Fairchild *v.* Daten, 38 Cal. 286; Gardner *v.* Ingram, 82 Ala. 339; 2 Sou. Rep. 879; Compte *v.* Toale, 24 Fla. 19; 3 Sou. Rep. 413; Executors of Yturbide *v.* United States, 22 How. 290; Green *v.* Castillo, 35 Mo. App. 127.

[8] Joint School Dist. *v.* Kemen, 68 Wis. 246; 32 N. W. Rep. 42; Rose's Estate, 72 Cal. 577; 14 Pac. Rep. 369.

The courts have no power to extend the time unless expressly authorized to do so by statute,[1] nor can the time limited for taking the appeal be extended by consent of parties;[2] but the courts may relieve a party from a failure to act in time where he has been prevented from acting by the fraud of the opposite party, or by accident, as in other proper cases.[3] But even this power may be limited as to time.[4]

What are "special proceedings" or "special cases" under the codes of some of the states and the question whether appeals may be taken in such proceedings or cases, under certain constitutional and statutory provisions, have received attention in other sections.[5]

It is generally held that an appeal will only lie from final judgments;[6] but this is subject to statutory regu-

[1] Elliott's App. Pro., sec. 112; Brough *v.* Meghill, 6 Utah, 317; Brough *v.* Richards, 23 Pac. Rep. 673; Cogswell *v.* Hogan, 1 Wash. St. 4; 23 Pac. Rep. 835; Executors of Yturbide *v.* United States, 22 How. 290.

[2] Cogswell *v.* Hogan, 1 Wash. St. 4; 23 Pac. Rep. 835.

[3] Elliott's App. Pro., sec. 112; United Lines Tel. Co. *v.* Stevens, 67 Md. 156; 8 Atl. Rep. 908; Hubbard *v.* Yocum, 30 W. Va. 740; 5 S. E. Rep. 867; Hutts *v.* Martin, 131 Ind. 1; 30 N. E. Rep. 698.

[4] Briggs *v.* Barker, 145 Mass. 287; 13 N. E. Rep. 907.

[5] *Ante*, secs. 33, 66, 68; see also People *v.* Perry, 79 Cal. 105; 21 Pac. Rep. 423; Sharon *v.* Sharon, 67 Cal. 185; 7 Pac. Rep. 456, 635; 8 Pac. Rep. 709; Appeal of Houghton, 42 Cal. 35; Fairchild *v.* Doten, 42 Cal. 125.

[6] *Ante*, sec. 21; 1 Am. & Eng. Enc. of Law, 616; McLish *v.* Roff, 141 U. S. 661; 12 Sup. Ct. Rep. 118; Meagher *v.* Minnesota, etc., Co., 145 U. S. 608; 12 Sup. Ct. Rep. 876; Frederick *v.* Connecticut, etc., Bank, 106 Ill. 147; Walker *v.* Spencer, 86 N. Y. 163; International Bank *v.* Jenkins, 109 Ill. 219; Snavely *v.* Abbott Buggy Co., 36 Kan. 106; 12 Pac. Rep. 522; Mitchell *v.* Powers, 16 Or. 487; 19 Pac. Rep. 647; Gates *v.* Bucki, 53 Fed. Rep. 961; 4 C. C. A. Rep. 116. As to what will amount to a final judgment within the rule, see 1 Am. & Eng. Enc. of Law, 617, 618, and authorities cited in the notes; Sharon *v.* Sharon, 67 Cal. 185; 7 Pac. Rep. 456, 635; 8 Pac. Rep. 709; Bolles *v.* Stockman, 42 Ohio St. 445; Fleenor *v.* Driskill, 97 Ind. 27; Frederick *v.* Connecticut, etc., Bank, 106 Ill. 147; International Bank *v.* Jenkins, 109 Ill. 219; State *v.* Arns, 72 Ia. 555; 34 N. W. Rep. 329; Guthrie *v.* Guthrie, 71 Ia. 744; 30 N. W. Rep. 779; Louisiana Nat'l Bank *v.* Whitney, 121 U. S. 284; 7 Sup. Ct. Rep. 897; Parsons *v.* Robinson, 122 U. S. 112; 7 Sup. Ct. Rep. 1153; Harman *v.* Barhydt, 20 Neb. 625; 31 N. W. Rep. 488; Schultz *v.* Keeler, 13 Pac. Rep. 481; Grant *v.* Phœnix, etc., Ins. Co., 106 U. S. 429; 1 Sup.

lation, and appeals are allowed, in some of the states, from interlocutory decrees and orders, and from orders made after judgment.[1]

With respect to this question it may be said, generally, that unless specifically provided otherwise, an appeal will only lie from a final judgment, order, or decree; but that an appeal may be taken from any judgment, decree, or order, final or interlocutory, if the statute authorizes it. In other words, the sole question as to the right of appeal is whether it is authorized by the statute or not. And where the statute fails to give the right of appeal it is usually held that *certiorari* is the proper remedy to be resorted to.[2] There can be no appeal from a refusal of a court to act.[3] An appeal may be taken from a part of a judgment.[4]

Notice of the appeal in some form is generally required to be given to the adverse party, and such notice is necessary to give the appellate court jurisdiction;[5] and where an appeal is allowed to be taken by a part only of the losing parties to a judgment, notice is sometimes required to be given to their co-parties who do not join in the action.[6]

The notice required to be given to co-parties is said to

Ct. Rep. 414; Ex parte Norton, 108 U. S. 237; 2 Sup. Ct. Rep. 490; Richards *v.* Coon, 13 Neb. 419; 14 N. W. Rep. 162; Ross *v.* Evans, 30 Minn. 206; 14 N. W. Rep. 897; Cleveland *v.* Burnham, 60 Wis. 16; 17 N. W. Rep. 126; Dufour *v.* Lang, 54 Fed. Rep. 913; 4 C. C. A. Rep. 663; 2 U. S. App. 477.

[1] Weiser *v.* Day, 77 Ia. 25; 41 N. W. Rep. 476; Baldwin *v.* Foss, 71 Ia. 389; 32 N. W. Rep. 389.

[2] State *v.* Probate Court, 51 Minn. 241; 53 N. W. Rep. 463.

[3] Greehn *v.* Shumway, 73 Cal. 263; 14 Pac. Rep. 863.

[4] *Ante*, sec. 84; Andrews *v.* Concannon, 76 Ia. 251; 41 N. W. Rep. 8.

[5] 1 Am. & Eng. Enc. of Law, 622; Elliott's App. Pro., sec. 173; Trounstine *v.* Ware, 39 La. Ann. 939; 3 Sou. Rep. 122; Toy *v.* San Francisco & S. R. R. Co., 75 Cal. 542; 17 Pac. Rep. 700; In re Castle Dome, etc., Co., 79 Cal. 246; 21 Pac. Rep. 746; Melville *v.* County of Chehalis, 3 Wash. 14; 13 Pac. Rep. 904; State *v.* Rogers, 71 Ia. 753; 32 N. W. Rep. 7; Barton *v.* Long, 45 N. J. Eq. 160; 16 Atl. Rep. 683.

[6] Elliott's App. Pro sec. 144; Hutts *v.* Martin, 131 Ind. 1; 30 N. E. Rep. 698.

be jurisdictional;[1] but as the object of the notice is not to acquire jurisdiction of the persons of such co-defendants, it is difficult to see upon what principle the notice can be held to be jurisdictional. The better rule seems to be that the notice to co-parties is not necessary to vest the court with jurisdiction of the appeal.[2] But while the court obtains jurisdiction of the appeal without such notice, its jurisdiction may be limited by the failure to give it, as it can render no judgment that will affect the rights of the co-parties not notified.[3]

Where the judgment is joint, all the parties thereto must be joined in the appeal, and if any, upon notice, refuse to become parties to the proceedings, those desiring to prosecute the appeal may do so.[4]

But this has been changed by statute in some of the states by which any party aggrieved may appeal without joining those jointly interested with him;[5] and where a petition in error is provided for by statute it is held that all of the defendants in a joint judgment are necessary parties, but that those who refuse to join in the petition may be made defendants thereto as in an original complaint.[6]

But notice even to the adverse parties is dispensed with by statute in some of the states where the appeal is taken within the term at which the judgment is rendered.[7]

Notice of appeal may be waived, as in case of an original summons, or other notice.[8]

In the absence of any statutory requirement to the con-

[1] Elliott's App. Pro., sec. 144.

[2] Moore *v.* Held, 73 Ia. 538; 35 N. W. Rep. 623; Wright *v.* Mahaffey, 76 Ia. 96; 40 N. W. Rep. 112.

[3] Moore *v.* Held, 73 Ia. 538; 35 N. W. Rep. 623.

[4] Todd *v.* Daniel, 16 Pet. 521.

[5] Lillienthal *v.* Carivite, 15 Or. 339; 15 Pac. Rep. 280.

[6] Smetters *v.* Rainey, 14 Ohio St. 287; Curtin *v.* Atkinson, 29 Neb. 612; 46 N. W. Rep. 91.

[7] Sauer *v.* Union Oil Co., 43 La. Ann. 699; 9 Sou. Rep. 566; Wilson *v.* Bennett, 132 Ind. 210; 31 N. E. Rep. 184.

[8] Elliott's App. Pro., secs. 146, 175.

trary, notice to parties who will be affected by the decision in the appellate court, only, need be given.[1]

It has been held that unless required by statute no notice of an appeal need be given;[2] but this is not in accordance with the general rule that notice, in some form, is always necessary where an action is commenced, or a new and independent proceeding taken in another court. Notice, in some form, is necessary to constitute due process of law;[3] and statutes providing that no notice is necessary, where an appeal is taken in term time, can only be upheld upon the theory that, until the close of the term, the proceedings are *in fieri* and the parties still before the court, and that they must, therefore, take notice of all proceedings taken including an appeal.

The law as to the sufficiency of notice and service is the same, in principle, as in case of original process which has been considered in another place.[4]

In some of the states the appellant is required to give bond within a limited time in order to perfect his appeal; and where such bond is required it is as requisite that it shall be executed and filed within the time limited as it is that notice shall be given.[5]

But provision is usually made for the amendment of a bond on appeal where it is defective, or the giving of a new one, the principle being the same as in case of defective notice or service.[6]

Sometimes an affidavit on appeal is required; and this, also, is jurisdictional.[7]

[1] Guarantee Trust & Safe Dep. Co. *v.* Buddington, 23 Fla. 514; 2 Sou. Rep. 885; Miller *v.* Rea, 71 Cal. 405; 12 Pac. Rep. 431; Lillienthal *v.* Carivita, 15 Or. 339; 15 Pac. Rep. 280.

[2] McBrien *v.* Riley, 57 N. W. Rep. 385. [3] *Ante*, sec. 33.

[4] *Ante*, secs. 35, 36, 37, 40; Guarantee Trust & Safe Dep. Co. *v.* Buddington, 23 Fla. 514; 2 Sou. Rep. 885; Williams *v.* Schmidt, 14 Or. 470; 13 Pac. Rep. 305.

[5] Corcoran *v.* Dismond, 71 Cal. 100; 11 Pac. Rep. 815.

[6] Wheeler *v.* Kuhns, 9 Colo. 196; 11 Pac. Rep. 97; Woodman *v.* Calkins, 12 Mont. 456; 31 Pac. Rep. 63; Rube *v.* Cedar County, 35 Neb. 896; 53 N. W. Rep. 1009.

[7] Kidder *v.* Fay, 60 Wis. 218; 18 N. W. Rep. 839.

In most of the states, a record of the proceedings in the court below is required to be brought up and filed in the appellate court. This record must contain so much of the proceedings as is necessary to present the question sought to be reviewed, the question must appear from the record to have been presented to the court below and decided,[1] an exception to such decision must appear to have been taken in the court below, at the proper time,[2] unless such exception is dispensed with by statute, as is sometimes the case, and error must appear from the record.[3]

Sometimes the question must be resubmitted to the court below by a motion for a new trial or other proceeding,[4] and, generally, an assignment of errors must be filed by the party appealing, showing the errors complained of.[5] But it is held that the failure to serve the assignment of errors on the attorney of the adverse party, when required, is not a jurisdictional defect.[6]

[1] Northern Pac. Ry. Co. *v.* Mares, 123 U. S. 710; 8 Sup. Ct. Rep. 321; Martyn *v.* Lamar, 75 Ia. 235; 39 N. W. Rep. 285; Chapman *v.* City Council, 28 S. Car. 373; 6 S. E. Rep. 158; Citizens' Bank *v.* Buddig, 65 Miss. 284; 4 Sou. Rep. 94; Benton *v.* Beattie, 63 Vt. 186; 22 Atl. Rep. 422.

[2] 1 Am. & Eng. Enc. of Law, 624; Lower Providence, etc., Ass'n *v.* Weikel, 13 Atl. Rep. 82; Campbell *v.* Pittman, 3 Sou. Rep. 455; Thornton *v.* Brady, 100 N. Car. 38; 5 S. E. Rep. 910.

[3] Coffin *v.* Taylor, 16 Or. 375; 18 Pac. Rep. 638; McClure *v.* Campbell, 25 Neb. 57; 40 N. W. Rep. 595; Kimmarle *v.* Houston, etc., Ry. Co., 76 Tex. 686; 12 S. W. Rep. 698; Reed *v.* Nixon, 36 W. Va. 681; 15 S. E. Rep. 416.

[4] Fairfield *v.* Dawson, 39 Kan. 147; 17 Pac. Rep. 804; Buettinger *v.* Hurley, 34 Kan. 585; 9 Pac. Rep. 197; Barrington *v.* Stoltz, 39 Minn. 63; 38 N. W. Rep. 808; Conner *v.* Town of Marion, 112 Ind. 517; 14 N. E. Rep. 488.

[5] Elliott's App. Pro., sec. 303; Clark *v.* Schnur, 40 Kan. 72; 19 Pac. Rep. 327; First Nat'l Bank *v.* Jaffrey, 41 Kan. 691: 19 Pac. Rep. 626; International & G. N. R. Co. *v.* Underwood, 67 Tex. 589; 4 S. W. Rep. 216; Thornton *v.* Brady, 100 N. Car. 38; 5 S. E. Rep. 910; Duncombe *v.* Powers, 75 Ia. 185; 39 N. W. Rep. 261; Tuscaloosa, etc., Co. *v.* Perry, 85 Ala. 158; 4 Sou. Rep. 635; Steele *v.* Grand Trunk, etc., Ry. Co., 125 Ill. 385; 17 N. E. Rep. 483; Line *v.* State, 131 Ind. 468; 30 N. E. Rep. 703; Lawrence *v.* Wood, 122 Ind. 452; 24 N. E. Rep. 159; Wallace *v.* Robeson, 100 N. Car. 206; 6 S. E. Rep. 650.

[6] Smith *v.* Wingard, 4 Wash. 37; 13 Pac. Rep. 903.

These requirements constitute limitations upon the jurisdiction of the appellate court, and only such questions as are presented by the record in the manner provided will be considered.[1]

There are exceptions to the rule that only such questions as have been presented to the court below will be heard on appeal. These are a want of jurisdiction of the subject-matter,[2] that the complaint does not state facts sufficient to constitute a cause of action,[3] or that the judgment is void for other reasons, which may be presented in the appellate court for the first time.

An appeal which vests jurisdiction in the appellate court takes it away from the court below, and no further proceeding can be had in the latter court,[4] except that in some cases the judgment may be enforced unless a bond is given to stay proceedings.[4]

Appellate courts are possessed of such inherent powers, and may exercise such incidental or auxiliary jurisdiction, as may be necessary to protect their general appellate jurisdiction and enforce their orders and decrees, and to this end they may issue such writs as may be necessary for that purpose, including *certiorari* to correct or bring up the record on appeal, injunction, *mandamus*, and prohibition.[5]

If a court entertains an appeal where no appeal is allowed by law, it may be prevented from acting by prohibition,[6] or, as is held in some of the cases, by *mandamus* to compel the court to dismiss the appeal.[7]

[1] 1 Am. & Eng. Enc. of Law, 624; Leach *v.* Lothian, 10 Colo. 439; 15 Pac. Rep. 816.

[2] 1 Am. & Eng. Enc. of Law, 624; Tuscaloosa, etc., Co. *v.* Perry, 85 Ala. 158; 4 Sou. Rep. 635; Fowler *v.* Eddy, 110 Pa. St. 117; 1 Atl. Rep. 789.

[3] Du Souchet *v.* Dutcher, 113 Ind. 249; 15 N. E. Rep. 459; Branch *v.* Faust, 115 Ind. 464; 17 N. E. Rep. 898.

[4] *Ante*, sec. 24, p. 150.

[5] *Ante*, secs. 79, 80, 81, 86; Elliott's App. Pro., secs. 504–518.

[6] *Ante*, sec. 81.

[7] Palmer *v.* Jackson, 90 Mich. 1; 50 N. W. Rep. 1085.

Jurisdiction of an appeal can not be given by consent where none exists by law.[1]

89. NATURALIZATION. Jurisdiction in matters of naturalization is vested by statute in the circuit and district courts of the United States, and the district and supreme courts of the territories, and state courts of record having common-law jurisdiction, and a seal, and clerk.[2]

The exclusive power to provide for such naturalization is vested in congress by the constitution, and the power can not be exercised by the states.[3] Formerly the declaration of intention, under oath, was required to be made before the court,[4] but it may now be made before the clerk of any of the courts named.[5]

If the courts were allowed, under the statute, to exercise their discretion as to the general qualifications as to intelligence and other attributes of a good and useful citizen, necessary to entitle an applicant to become such, this would be a most important jurisdiction. As it is the only questions upon which the court is required or authorized to pass is whether the applicant has resided within the United States for five years, and in the state or territory where the court is at the time held, one year, and has, during that time, behaved as a man of good moral character attached to the principles of the constitution of the United States, and well disposed to the good order and happiness of the same.[6] And as to all of these qualifications, except that of residence, the mere oath of the applicant, alone, is

[1] Crane *v.* Farmer, 14 Colo. 294; 23 Pac. Rep. 455; Harvey *v.* Travelers Ins. Co., 18 Colo. 354; 32 Pac. Rep. 935.

[2] Rev. Stat. U. S., sec. 2165; Claflin *v.* Houseman, 93 U. S. 130; Matter of Ramsden, 13 How. Pr. 429.

[3] Const. U. S., Art. 1, sec. 8; Matter of Ramsden, 13 How. Pr. 429; Stephens, Petitioner, 4 Gray, 559; Chirac *v.* Chirac, 2 Wheat. 260. But see Collett *v.* Collett, 2 Dall. 294, in which it is held that the states have concurrent power with congress upon the subject of naturalization.

[4] Rev. Stat. U. S., sec. 2165.

[5] Supl. Rev. Stat. U. S., Vol. I, p. 97; 19 Stat. at L. 2.

[6] In re Kanaka Nian, 6 Utah, 259; 21 Pac. Rep. 993.

sufficient to entitle him to citizenship in the discretion of the court.[1]

But the discretion of the court has been extended, by a very liberal construction of the statute, and an applicant who did not appear to have sufficient intelligence to understand the principles of the government has been refused the rights of citizenship.[2]

[1] Rev. Stat. U. S., sec. 2165.

[2] "The admission of the applicant to citizenship was opposed, also, on the ground that he did not appear to be possessed of sufficient intelligence to become a citizen; that his intellect and conscience were not sufficiently enlightened. The second division of section 2165 of the Revised Statutes requires that the applicant shall declare on oath before the court that he will support the constitution, and that he absolutely and entirely renounces and abjures all allegiance and fidelity to every foreign prince, potentate, state, and sovereignty whatever, and particularly to the one of which he was before a citizen or subject. His feeling of obligation to his adopted country must be paramount to such feeling for any other. His allegiance must be undivided. The third division of the above section is as follows: 'It shall be made to appear to the satisfaction of the court admitting such alien that he resided within the United States five years at least, and within the state or territory where such court is at the time held one year at least; and that during that time he has behaved as a man of good moral character, attached to the principles of the constitution of the United States, and well disposed to the good order and happiness of the same. . . .' This provision imposes upon the court the duty of determining, upon the evidence, whether the applicant has behaved during his residence as a man of good moral character, attached to the principles of the constitution, and well disposed to the good order and happiness of the people of the United States. This statute makes it the duty of the court to judge of the applicant's moral character from his conduct in evidence, as well as of his attachment to the constitution and his disposition toward the good order, happiness, and welfare of the people. The constitution places on the citizen the direction of the government; that government which should protect human life, but may sacrifice it; that may guard our liberties, or may be used to overthrow them; that should secure our right to the pursuit of happiness, and to property, but which may violate or destroy them. The will upon which the welfare of the millions who are now here, and who are to follow us, so largely depends, should be intelligent and virtuous. The man intrusted with the high, difficult, and sacred duties of an American citizen should be informed and enlightened. He should have sufficient intelligence to discriminate right from wrong in political matters, and should possess a feeling of moral obligation sufficient to cause him to adopt the right.

The example is a wholesome one that it would be well for other courts to follow.

As to the statutory qualifications, the court before which the same is made must be satisfied,[1] and therefore some discretion is vested in the courts respecting the proof necessary to establish their existence.

The necessity of making the preliminary declaration of intention, and proof of residence for the full five years, is dispensed with in certain cases, but these exceptions are not important in this connection.

The initiatory proceedings which are authorized to be taken before the clerk are ministerial; but the final proceedings by which the applicant is admitted to citizenship are judicial;[2] the adjudication of the court is conclusive, as against a collateral attack, as in other cases;[3] and the certificate can not, in a collateral proceeding, be overthrown by proof that it was procured by false or perjured

In the law quoted congress expressed an intention to admit to citizenship aliens of good moral character, attached to the principles of liberty and justice contained in the constitution, and desirous of the public good, and to exclude aliens who live immoral lives and disregard moral principles, who are in favor of despotism, and are indifferent to or opposed to those institutions upon which the welfare of all depends. They intended to exclude the immoral, those who are opposed to the principles of liberty and justice, or are in favor of anarchy and confusion. No alien who is not willing to support the constitution, and all laws pursuant to it, should be admitted to citizenship. No one should be admitted who has not sufficient intelligence to understand the principles of the government which may rest in part on his will." In re Kanaka Nian, 6 Utah, 259; 21 Pac. Rep. 993.

[1] Rev. Stat. U. S., sec. 2165, sub. 3.

[2] Ex parte Knowles, 5 Cal. 300; State *v.* Hoeflinger, 35 Wis. 393; Spratt *v.* Spratt, 4 Pet. 393; State *v.* Barrett, 40 Minn. 65; 41 N. W. Rep. 459; State *v.* Boyd, 31 Neb. 682; 48 N. W. Rep. 739; Morgan *v.* Dudley, 18 B. Monroe, 693; 68 Am. Dec. 735; Charles Green's Son *v.* Salas, 31 Fed. Rep. 106.

[3] People *v.* McGowan, 77 Ill. 644; 20 Am. Rep. 254; State *v.* Hoeflinger, 35 Wis. 393, 400; McCarthy *v.* Marsh, 5 N. Y. 263; Spratt *v.* Spratt, 4 Pet. 393, 407; Behrensmeyer *v.* Kreitz, 135 Ill. 591; 26 N. E. Rep. 704; The Acorn, 2 Abb. U. S. 434; 1 Fed. Cas. 52; Stark *v.* Chesapeake Ins. Co., 7 Cranch, 420; Charles Green's Son *v.* Salas, 31 Fed. Rep. 106.

testimony;[1] but may be attacked and set aside for fraud, in a direct proceeding for that purpose, as in other cases, where the fraud or collusion is as to matters collateral and not before the court or involved in the issue to be determined;[2] and the court may vacate its judgment or order in such proceedings as in other cases.[3]

A proceeding by the United States to annul a certificate of naturalization obtained from a state court by fraud may be prosecuted in a federal court.[4]

The adjudication can be shown only by the record, and can not be established by parol evidence;[5] but this rule does not prevent parol proof of the contents of a record lost or destroyed.[6]

Where the record shows all of the facts necessary to entitle the applicant to citizenship, no formal order of the court to that effect is necessary to establish his right;[7] and the fact that one has been naturalized may be inferred, or presumed, from the fact that he has, for a long time, voted, held office, and exercised all the rights and privileges of a citizen.[8]

A court, having power under the laws of the state to amend its records by orders *nunc pro tunc*, may do so in cases of naturalization, although no such power is given them by the act of congress vesting them with jurisdiction in such proceedings.[9]

The order or certificate admitting the applicant to citizenship vests him therewith only from the time such order

[1] 6 Am. & Eng. Enc. of Law, 435; The Acorn, 2 Abb. U. S. 434; 1 Fed. Cas. 52.

[2] *Ante*, sec. 84; The Acorn, 2 Abb. U. S. 434; 1 Fed. Cas. 52.

[3] *Ante*, sec. 84; United States *v.* Norsch, 42 Fed. Rep. 417.

[4] United States *v.* Norsch, 42 Fed. Rep. 417.

[5] Dryden *v.* Swinburne, 20 W. Va. 89; State *v.* Boyd, 31 Neb. 682; 48 N. W. Rep. 739; Berry *v.* Hull, 30 Pac. Rep. 936; Charles Green's Son *v.* Salas, 31 Fed. Rep. 106.

[6] Charles Green's Son *v.* Salas, 31 Fed. Rep. 106.

[7] Cowan *v.* Prowse, 19 S. W. Rep. 407; Matter of Christern, 56 How. Pr. 5; 43 N. Y. Super. Ct. 523; Campbell *v.* Gordon, 6 Cranch. 176.

[8] Boyd *v.* State of Nebraska, 143 U. S. 135; 12 Sup. Ct. Rep. 375. But see to the contrary, State *v.* Boyd, 31 Neb. 682; 48 N. W. Rep. 739.

[9] Matter of Christern, 56 How. Pr. 5; 43 N. Y. Super. Ct. 523.

is made. It can not be made to relate back to a prior date even by an express order of the court to that effect.[1]

The jurisdiction in the state courts is peculiar in that it is vested by act of congress which can not, ordinarily, be done.[2]

The cases differ as to the capacity in which the state courts act, whether as the agents of and for the general government, or whether the jurisdiction is to be regarded as a part of their jurisdiction as state courts extended by act of congress to this particular proceeding,[3] and, therefore, whether the state courts are bound to perform the duty thus imposed upon them.[4]

But these questions are not material, as the courts have almost uniformly acted upon the theory that it is their duty to exercise the jurisdiction, and their power to exercise it has been thoroughly established.[5]

One of the uncertain elements of the jurisdiction is the oft-recurring one as to what are courts of record having common-law jurisdiction. The purport of the decided cases is that it is not necessary that the court shall be one of general common-law jurisdiction, but that, if it exercises such jurisdiction at all, however limited the jurisdiction may be, it is within the statute.[6]

[1] Dryden *v.* Swinburne, 20 W. Va. 89, 115; State *v.* Boyd, 31 Neb. 682; 48 N. W. Rep. 739.

[2] Ex parte Knowles, 5 Cal. 300.

[3] Ex parte Knowles, 5 Cal. 300; Claflin *v.* Houseman, 93 U. S. 130, 140; Matter of Ramsden, 13 How. Pr. 429.

[4] Matter of Ramsden, 13 How. Pr. 429; Stephens, Petitioner, 4 Gray, 559.

[5] Matter of Conner, 39 Cal. 98; Claflin *v.* Houseman, 93 U. S. 130, 140; United States *v.* Lehman, 39 Fed. Rep. 49; Dale *v.* Irwin, 78 Ill. 170, 183; People *v.* McGowan, 77 Ill. 644; 20 Am. Rep. 254; Morgan *v.* Dudley, 18 B. Monroe, 693; 68 Am. Dec. 735; Stephens, Petitioner, 4 Gray, 559.

[6] This question has been considered in other sections: *Ante*, secs. 6, 7, 20, 23, 25. But see further as to the qualification of the courts under this section of the act of congress, Ex parte Knowles, 5 Cal. 300; Matter of Conner, 39 Cal. 98; United States *v.* Lehman, 39 Fed. Rep. 49; Dale *v.* Irwin, 78 Ill. 170, 183; People *v.* McGowan, 77 Ill. 644; 20 Am. Rep. 254; Morgan *v.* Dudley, 18 B. Monroe, 693; 68 Am. Dec. 735; Mills *v.*

But the court must not only have common-law jurisdiction. It must have the other statutory qualifications. Therefore a court which is not a court of record or has no clerk has no jurisdiction in this class of proceedings.[1]

It has been held that the declaration of intention before the clerk need not be made at the office of the clerk or in open court, but may be made elsewhere;[2] but this has been doubted.[3]

The mere misnomer of the applicant in the certificate of citizenship does not vitiate it, and the true name may be shown by parol.[4]

90. PARDONS. The judgment of a court in a criminal case may be deprived of its force and effect either wholly or in part, and its execution prevented, by a pardon of the defendant. The power to pardon is in no sense a judicial function,[5] although executive and other officers vested with the pardoning power may feel it incumbent upon them to investigate anew the law and evidence upon which the applicant for executive clemency was convicted at the trial.

The power is an executive one and is defined as "an act of grace proceeding from the powers intrusted with the execution of the laws, which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed." [6]

McCabe, 44 Ill. 194; Knox County *v.* Davis, 63 Ill. 405; In re Dean, 83 Me. 489; 22 Atl. Rep. 385; People *v.* Pease, 30 Barb. 588, 599.

[1] In re Dean, 83 Me. 489; 22 Atl. Rep. 385.

[2] Andres *v.* Judge, 77 Mich. 85; 43 N. W. Rep. 857.

[3] In re Langtry, 31 Fed. Rep. 879.

[4] Behrensmeyer *v.* Kreitz, 135 Ill. 591; 26 N. E. Rep. 704.

[5] United States *v.* Wilson, 7 Pet. 150; State *v.* Sloss, 25 Mo. 291; 69 Am. Dec. 467; Commonwealth *v.* Halloway, 44 Pa. St. 210; 84 Am. Dec. 431.

[6] 17 Am. & Eng. Enc. of Law, 317. As to the difference between pardon, reprieve, commutation, and amnesty, and the effects of each, see 8 Am. Law Reg., pp. 513, 577, where the extent of the power to pardon and the effect of its exercise are fully discussed. See, also, on the same subjects, Ex parte Wells, 18 How. 307; Sterling *v.* Drake, 29 Ohio St.

The power to pardon includes the power to reprieve unless otherwise provided;[1] but not the power of commutation, which is the substitution of one punishment for another.[2]

The term commutation is sometimes used, however, as the shortening of a term of imprisonment, or otherwise lessening the punishment, and so used it is within the general power to pardon. It was a prerogative power at common law, in England, and belonged to the crown, although limited and controlled by parliament.[3]

In this country the power, as respects offenses against the federal government, except in cases of impeachment, is vested by the constitution in the President of the United States.[4]

In the several states the power is generally vested, by the constitution, in the governor; but in some a board of pardons, consisting, usually, of the governor and other designated officers, is provided for; and in others limitations of different kinds, requiring the concurrence of others than the governor, are imposed, upon the theory that absolute and uncontrolled power and discretion in a matter of such importance should not be vested in one man.[5]

Where the power is given by the constitution, its exercise can not be taken away or limited by statute, unless such power of limitation or restraint is authorized by the constitution itself;[6] and the power can not be exercised directly by the legislative department of government.[7]

457; 23 Am. Rep. 762; Osborn *v.* United States, 91 U. S. 474; In re Deming, 10 Johns. (N. Y.) 232; Cook *v.* Freeholders, 26 N. J. Law, 326; 27 N. J. Law, 637; Ex parte Janes, 1 Nev. 319.

[1] Ex parte Wells, 18 How. 307; Sterling *v.* Drake, 29 Ohio St. 457; 23 Am. Rep. 762.

[2] Ex parte Janes, 1 Nev. 319.

[3] 17 Am. & Eng. Enc. of Law, 318; 8 Am. Law Reg. 526, 529; Sterling *v.* Drake, 29 Ohio St. 457; 23 Am. Rep. 762.

[4] Const. U. S., Art. 2, sec. 2; United States *v.* Wilson, 7 Pet. 150.

[5] 17 Am. & Eng. Enc. of Law, 320.

[6] In re Moore, 31 Pac. Rep. 980.

[7] *Ante*, sec. 29; State *v.* Sloss, 25 Mo. 291; 69 Am. Dec. 467.

As a rule, the power to pardon is withheld, by the constitution, from cases of impeachment and of treason.

The power may be exercised before or after conviction,[1] and after the offense has been fully expiated,[2] and in favor of one person by name, or of a class of persons, or of all persons who may be guilty of certain offenses,[3] and includes the power to pardon absolutely, or conditionally, and entirely, or only partially.[4]

Under the constitutions of some of the states, the power to pardon can not be exercised until after conviction;[5] and it is held, under such a limitation of the power, that the verdict of the jury is a conviction, and the pardon may be granted before judgment or after an appeal, by which the judgment is in effect vacated.[6]

It is not a power that can be enforced, as against one in whose favor it is exercised, but he may accept or refuse a pardon offered him at his option.[7]

If the pardon is conditional, the conditions must be performed by its recipient, whether such conditions be precedent or subsequent, or the pardon will become void;[8] and for a violation of the condition the convict may be remanded to prison to serve out his term, although the term for his imprisonment has expired since his release.[9]

A pardon once granted and accepted can not be revoked, except it be conditional and the condition has been violated.[10]

[1] 17 Am. & Eng. Enc. of Law, 320; 8 Am. Law Reg. (N. S.) 516; State *v.* Woolery, 8 Mo. 300.

[2] State *v.* Foley, 15 Nev. 64; 37 Am. Rep. 458.

[3] Ex parte Garland, 4 Wall. 333.

[4] 17 Am. & Eng. Enc. Law, 320; United States *v.* Wilson, 7 Pet. 150; Ex Parte Wells, 18 How. 307; Osborn *v.* United States, 91 U. S. 474; State *v.* Barnes, 32 S. Car. 14; 10 S. E. Rep. 611; Ex parte Janes, 1 Nev. 319.

[5] State *v.* Alexander, 76 N. Car. 231; 22 Am. Rep. 675.

[6] State *v.* Alexander, 76 N. Car. 231; 22 Am. Rep. 675; Commonwealth *v.* Lockwood, 109 Mass. 323; 12 Am. Rep. 699.

[7] United States *v.* Wilson, 7 Pet. 150.

[8] Ex parte Janes, 1 Nev. 319; Ex parte Marks, 64 Cal. 29; 28 Pac. Rep. 109.

[9] State *v.* Barnes, 32 S. Car. 14; 10 S. E. Rep. 611.

[10] Rosson *v.* Stehr, 23 Tex. App. 287; 4 S. W. Rep. 897.

In some of the states the governor or other pardoning power has unlimited power to determine, without a hearing, whether the condition upon which a pardon has been granted has been violated, and to order the one to whom the pardon was granted recommitted to prison; but in other states the party is entitled to a hearing upon the question whether he has violated the condition of the pardon or not.

Where an examination is required on the part of the governor, it has been held that notice to the convict is not necessary;[1] but the better rule on the subject is that the convict is entitled to notice and a hearing upon the question whether he has violated the conditions of his pardon or not, and that a statute which authorizes the summary recaption and imprisonment of such convict without such notice and hearing is unconstitutional.[2] A different rule must prevail where the prisoner is out on parol, granted by the governor, as he is still a prisoner.[3]

In some of the states it is provided by statute that prisoners shall be entitled to certain deductions from their terms of imprisonment imposed by the judgment of conviction for good behavior while in prison. Such statutes are not infringements upon the pardoning power, although they may have the same effect as a pardon.[4]

A pardon procured by fraud is void.[5]

[1] Kennedy's case, 135 Mass. 48.

[2] People *v.* Moore, 62 Mich. 496; 29 N. W. Rep. 80; see, also, State *v.* Wolfer, 54 N. W. Rep. 1065.

[3] Woodward *v.* Murdock, 124 Ind. 439; 24 N. E. Rep. 1047.

[4] Ex parte Wadleigh, 82 Cal. 518; 23 Pac. Rep. 190.

[5] Commonwealth *v.* Halloway, 44 Pa. St. 210; 84 Am. Dec. 431.

INDEX.

(THE REFERENCES ARE TO BOTH THE SECTIONS AND PAGES.)

(NOTE.—The whole book has been carefully indexed under the one title "Jurisdiction," besides the indexing under sub-heads, and the subjects of the sections are indicated by **black type** in this general index, so that if any matter has been omitted from its appropriate place elsewhere, it can be easily traced and found under Jurisdiction.)

A

Abatement. (See PLEA IN ABATEMENT.)
of nuisance when constructive notice allowed in action for, sec. 38, p. 270

Acceptance of Service. (See SERVICE OF PROCESS.)
of process, what sufficient as proof of service, sec. 39, p. 291

Account—
running, can not be divided to bring amount within jurisdiction, sec. 16, p. 62
footing of controls in determining jurisdiction as to amount, sec. 16, p. 60

Actions. (See PERSONAL ACTIONS.)
affecting title to real estate are local, sec. 12, p. 35
personal are transitory, sec. 12, p. 35
may be brought where plaintiff and defendant reside, though cause arose elsewhere, sec. 12, p. 35
transitory, exception in case of corporations, sec. 12, p. 35
where plaintiff is resident of state, defendant not, may be brought in any county, sec. 12, p. 30
for divorce residence of plaintiff gives jurisdiction, sec. 12, p. 36; sec. 73, p. 513. (See DIVORCE.)
non-resident may maintain, sec. 13, p. 43
action defined, sec. 68, p. 461
distinctions between, and special cases and special proceedings, sec. 68, pp. 461–469

Adjournment of Court. (See TERMS OF COURT.)
final, ends powers of court for term, sec. 19, p. 84
premature, by sheriff, judge may hold court balance of term, sec. 19, p. 84
to wrong time, or without fixing time, effect on jurisdiction, sec. 24, p. 149
not authorized by law, effect of, sec. 24, p. 149

Admiralty and Maritime Jurisdiction—
Courts of, in England, superseded by supreme court of judicature, sec. 3, p. 3
jurisdiction in, belongs to U. S. district courts, sec. 17, p. 73
jurisdiction of district courts in, extends to navigable lakes and streams, sec. 17, p. 73
state court has jurisdiction to decree common-law remedy in, sec. 17, p. 73

Admiralty and Maritime Jurisdiction—*Continued.*
conferred by constitutions and statutes, sec. 10, p. 29
of federal courts not confined to tide waters, sec. 17, p. 73
extends to other navigable lakes and streams, sec. 17, p. 73
generally belongs exclusively to federal courts, sec. 70, p. 483
but state courts not wholly without, sec. 70, p. 483
but not strictly speaking admiralty jurisdiction, sec. 70, p. 484
confined to interior navigation, where no interstate or foreign commerce, sec. 70, p. 484
over such navigation federal courts have no jurisdiction, sec. 70, p. 484
claims against vessels not maritime within jurisdiction of state courts, sec. 70, p. 484
liens provided by state laws when enforceable in federal courts, sec. 70, p. 484
when enforceable in state courts, sec. 70, p. 484
depends upon character of contract, sec. 70, p. 484
when discretionary with federal court whether to enforce or not, sec. 70, p. 485
in regulation of commerce congress may provide for liens, sec. 70, p. 485
but, if does not, states may, sec. 70, p. 485
when states may regulate fisheries, sec. 70, p. 485
states can not by providing for liens extend jurisdiction of federal courts, sec. 70, p. 485
nor can courts decline to enforce because provided for by state, sec. 70, p. 485
may enforce state lien on domestic vessel, though maritime law would only give on foreign vessel, sec. 70, p. 485
but state courts can not enforce lien on vessel engaged in foreign commerce, sec. 70, p. 485
but may against vessels navigating inferior streams and not engaged in foreign or interstate commerce, sec. 70, p. 486
general rule that admiralty jurisdiction confined to tide waters to the ebb and flow, sec. 70, p. 486
but federal courts extend to navigable lakes and rivers above tides where commerce carried on between different states or with foreign nation, sec. 70, p. 486
common-law remedy growing out of maritime transaction may be administered by state court, sec. 70, p. 486
fact that common-law remedy aided by lien does not affect jurisdiction, sec. 70, pp. 486, 487

Administrators. (See PROBATE JURISDICTION; SALES OF REAL ESTATE.)
question of validity of appointment of, how raised in case of sale of real estate by, sec. 76, p. 556
whether in such case appointment of, can be collaterally attacked, sec. 76, pp. 556, 557
what is necessary to give court jurisdiction to order sale of real estate by, sec. 76, pp. 557, 558
petition foundation of jurisdiction, sec. 76, p. 558
what petition must show, sec. 76, pp. 558, 559
order of sale an adjudication of all jurisdictional facts, sec. 76, p. 560
notice must be given, sec. 76, p. 563
whether heirs necessary parties, sec. 76, p. 564

Affidavit—
for publication, can not control as to jurisdiction against matters appearing in judgment roll, sec. 25, p. 164
for publication of constructive notice, what must show, sec. 38, pp. 271–279
making of, is jurisdictional step, sec. 38, p. 271
substantial compliance with statute necessary, sec. 38, pp. 271–273
when judgment rendered under, void, sec. 38, pp. 271, 272
not a part of judgment roll, sec. 38, p. 273
how due diligence in effort to make personal service must be shown in, sec. 38, p. 275
when statements on information and belief sufficient, sec. 38, pp. 276, 277
when may be amended, sec. 38, p. 279
of publication of constructive notice, what must show, sec. 38, pp. 285, 286. (See Constructive Service.)
failure to make effect of, sec. 38, p. 285
by whom may be made, sec. 38, p. 285
of personal service, when proper, sec. 39, p. 287
what must be shown by, sec. 39, p. 288
for change of venue, who may be made by, sec. 47, p. 340
what must show, sec. 47, p. 340; sec. 48, p. 343
may be amended, sec. 47, p. 340
in contempt proceedings, when necessary, and what must show, sec. 72, pp. 492, 493. (See Contempts.)
necessary in attachment, sec. 74, p. 523. (See Attachment.)
what must show, sec. 74, pp. 524–528, 529–534
who may make, sec. 74, p. 528
in garnishment, sec. 75, p. 549. (See Garnishment.)
in *ne exeat* and arrest and bail, sec. 78, p. 586. (See Ne Exeat and Arrest and Bail.)
may be amended, sec. 78, p. 587

Agreed Statement—
may by consent take place of pleadings and give jurisdiction, sec. 12, p. 33
affidavit that controversy real necessary, sec. 12, p. 33

Alimony. (See Divorce.)

Amendment. (See Complaint, Judgment, Jurisdiction, Pleadings.)
of complaint after service by publication, judgment by default on, void, sec. 8, p. 22
new notice must be given, sec. 14, p. 49
court has inherent power to amend its record, sec. 27, p. 181
of notice of appearance, when may be made, sec., 34, p. 227
of proceedings in attachment, sec. 74, pp. 544–545

Appeal. (See Appellate Jurisdiction.)
appellate court having original jurisdiction of subject-matter, but lower court not, and parties appear, judgment of former binding, sec. 12, p. 34
right of is statutory and may be extended by statute, sec. 21, p. 98
and statute must be followed, sec. 21, p. 99
time for can not be extended by parties nor by court, sec. 21, p. 99
in some states, time does not run against parties under legal disabilities, sec. 21, p. 99
when constitutes a waiver by appearance, sec. 22, p. 110
question of jurisdiction, how may be raised on, sec. 22, p. 112
effect of on jurisdiction of court, sec. 24, p. 150
effect of on judgment appealed from, sec. 24, p. 150

Appeal—*Continued.*
death of party on when new parties must be made, sec. 42, p. 307
where judgment is joint, must be taken within time by all judgment defendants, sec. 21, p. 99
if any refuse to join and notice required, same must be given or appeal is ineffectual, sec. 21, p. 99
appearance and failure to join will not waive such notice, sec. 21, p. 99
where has failed through failure to observe requisites, second may be prosecuted, sec. 21, p. 100
can be no second when first is pending, sec. 21, p. 100
where is allowed on some action of lower court, such action must be shown, sec. 21, p. 100
where record shows that court has not jurisdiction will be dismissed, sec. 21, p. 100
where question of jurisdiction depends upon proceedings below, record is conclusive, sec. 21, p. 100
consent of parties will not give right to determine other questions, sec. 21, p. 100
where record shows subject-matter out of jurisdiction, consent can not give, sec. 21, p. 100
can not be taken by consent to court not having jurisdiction, sec. 21, p. 100
actual controversy must appear, sec. 21, p. 101
will lie only from decision of a court, sec. 21, p. 101
will lie only from decision upon judicial question, sec. 21, p. 101
assignment of errors to be filed, sec. 21, p. 101
same must be filed in statutory time, sec. 21, p. 101
except where prevented by fraud, etc., sec. 21, p. 101
lower court must have had jurisdiction of subject-matter, sec. 21, p. 102
where trial *de novo*, amendment of complaint to increase amount above jurisdiction of lower court will divest jurisdiction of appeal, sec. 21, p. 102
origin of the right of, sec. 88, p, 728
is now wholly statutory, sec. 88, p. 728
what may be reviewed by, sec. 88, pp. 728–730
how jurisdiction in given, sec. 88, p. 730
not proper to remove cause from state court to supreme court of United States, sec. 88, p. 730
when remedy must be sought, sec. 88, p. 730
courts can not extend time given by statute, sec. 88, p. 731
generally will only lie from final judgments, sec. 88, p. 731
but provided otherwise in some states, sec. 88, pp. 731, 732
right of appeal in all cases depends upon the statute, sec. 87, p. 732
may be taken from part of judgment, sec. 88, p. 732
notice of appeal required, sec. 88, pp. 732, 733, 734
notice to co-parties when necessary and objects of, sec. 88, pp. 732, 733
who must be joined in the appeal, sec. 88, p. 733
notice in what cases dispensed with, sec. 88, p. 733
notice may be waived, sec. 88, p. 733
who must be notified, sec. 88, pp. 733, 734
bond, when required and effect of failure to give, sec. 88, p. 734
affidavit on appeal when necessary, and effect of failure to make, sec. 88, p. 734
provision usually made for amendment, sec. 88, p. 734
record on appeal, what must contain, sec. 88, p. 735
motion for new trial, when necessary as foundation for, sec. 88, p. 735

Appeal—*Continued.*
assignment of errors, necessity for and when must be filed, sec. 88, p. 735
requirements of statute are limitations upon jurisdiction, sec. 88, p. 736
only questions presented by the record can be considered, sec. 21, p. 100: sec. 88,p. 736
exceptions, sec. 88, p. 736
effect of appeal on jurisdiction of court below, sec. 88, p. 736
inherent powers of appellate courts, sec. 88, p. 736
may be prevented from acting, when and how, sec. 88, p. 736
jurisdiction can not be given by consent, sec. 88, p. 737

Appearance. (See JURISDICTION.)
special, what constitutes, sec. 13, p. 37; sec. 22, p. 110
special, mode of, in England, sec. 13, p. 38
by unauthorized attorney, effect of, sec. 13, p. 38
by attorney presumed to be authorized, sec. 13, p. 41
record showing, not conclusive, sec. 13, p. 41
subsequent, will not validate proceeding against non-resident, sec. 13, p. 41; sec. 22, p. 104
can not be entered for minor, sec. 13, p. 43
general, waives service of process and objection to jurisdiction of person, sec. 22, p. 103
special, to object to jurisdiction, does not, sec. 22, p. 103
general, after special and objection to jurisdiction overruled a waiver, sec. 22, pp. 103, 104
party wishing to object to jurisdiction must keep out of court after special and objection overruled, sec. 22, p. 104
resident defendant made party fraudulently to give jurisdiction, effect of, sec. 22, p. 104
after default and motion to set aside judgment not a waiver, sec. 22, p. 105
nor to contest amount of damages after default, sec. 22, pp. 105, 106
what is an appearance, sec. 34, p. 225
different kinds of, sec. 34, p. 225
general, what is, and its effect, sec. 34, pp. 225, 227–229, 231, 233
must be done in court, sec. 34, p. 225
appearance for removal of cause to federal court, effect of, sec. 34, pp. 226, 227
special appearance and its effects, sec. 34, pp. 227, 228, 231, 234
withdrawal of pleading does not withdraw appearance, sec. 34, p. 227
difference between illegal service and want of service, as to effect of appearance, sec. 34, p. 229
appeal, effect of, as appearance, sec. 34, pp. 229–231
answer, when not a general appearance, sec. 34, p. 232
want of jurisdiction of subject-matter can not be waived, sec. 34, p. 232
special appearance gives jurisdiction in some states, sec. 34, p. 232
and applies to non-resident served out of state, sec. 34, p. 232
but doctrine exceptional, sec. 34, p. 232
effect of code provisions as to effect of appearance, sec. 34, pp. 232, 233
withdrawal of attorney withdraws pleadings, sec. 34, p. 233
effect of unauthorized appearance, sec. 34, p. 233
effect of appearance in main action upon auxiliary proceeding, sec. 34, pp. 233, 234
appearance can not be entered for minor without service of process, sec. 34, p. 234

Appellate Courts. (See APPEALS; APPELLATE JURISDICTION.)
how notice given to vest with jurisdiction, sec. 35, p. 239
power of, to issue injunctions, sec. 79, pp. 589, 595
power of, to issue writs of mandamus, sec. 80, pp. 625–627
power of, to issue writs of prohibition, sec. 81, pp. 630, 637

Appellate Jurisdiction. (See APPEALS; JURISDICTION; ORIGINAL JURISDICTION.)
when court has, of subject-matter, on appeal from court not having, sec. 12, p. 34
as to amount, how amount in controversy determined, sec. 16, pp. 64–67
defined, sec. 21, pp. 97, 98
usually extends only to final judgments and orders, sec. 21, p. 98
sometimes to interlocutory decrees and orders, sec. 21, p. 98
court may be vested with both original and, sec. 21, p. 98
courts of, possessed of inherent and incidental powers, sec. 21, p. 98
steps necessary to give, provided by statute, sec. 21, p. 99
and must appear of record to have been taken, sec. 21, p. 99
time of appeal can not be extended by consent, sec. 21, p. 99
when depends upon proceedings of trial court, record of, conclusive, sec. 21, p. 100
exists only as to questions appearing of record, sec. 21, p. 100
questions not of record can not be presented by consent, sec. 21, p. 100
if record shows want of, as to subject-matter, consent of parties can not give, sec. 21, p. 100
appeal can not be taken to court not having, by consent, sec. 21, p. 101
assignment of errors when necessary to confer, sec. 21, p. 101
must be filed within time required, sec. 21, p. 101
when party relieved from failure to file in time, sec. 21, p. 101
to give, court below must have had jurisdiction of subject-matter, sec. 21, p. 102
amendment of complaint, when deprives court of, sec. 21, p. 102
means of giving notice of appeal, sec. 35, p. 239
to issue injunction, sec. 79, pp. 589, 595–600, 606
to issue writs of mandamus, sec. 80, pp. 625–627
to issue writ of prohibition, sec. 81, p. 637
in cases of direct appeals, sec. 88, pp. 727–737. (See APPEALS.)

Arbitration.
defined, sec. 77, p. 572
two kinds, common law and statutory, sec. 77, p. 572
common law submission may be by parol, sec. 77, p. 572
statutory must be in writing, sec. 77, p. 572
common law stands upon decision of arbitrators, sec. 77, p. 572
statutory award usually required to be reported to and confirmed by some court, sec. 77, p. 573
no particular form of submission necessary in former, sec. 77, p. 573
latter must conform to statute, sec. 77, p. 573
when defective statutory may be upheld as common law, sec. 77, p. 573
subject involves powers of arbitrators, sec. 77, p. 573
and effect of submission of pending actions on jurisdiction of court over, sec. 77, p. 573
also, in statutory, of power of court to confirm, sec. 77, p. 573
submission is measure and limitation of powers of arbitrators, sec. 77, p. 574

Arbitration—*Continued.*
and this is true of submission of matters in court, sec. 77, p. 574
but subject to right of contestants to submit under statute, sec. 77, p. 574
matters in court all parties must consent, sec. 77, p. 574
applies to statutory, sec. 77, p. 574
parties entitled to notice, sec. 77, p. 574
arbitrators must meet at time named in submission, sec. 77, p. 574
parties must have opportunity to be present, sec. 77, p. 574
notice, how waived, sec. 77, pp. 574, 575
arbitrators limited as to time by submission, sec. 77, p. 575
award after time inoperative, sec. 77, p. 575
and returned to court too late court can not confirm, sec. 77, p. 575
failure to meet at time appointed, effect of, sec. 77, p. 575
powers expire with making award, sec. 77, p. 575
can not alter or change award, sec. 77, p. 575
or make a new one where first is void, sec. 77, p. 575
attempt to change, effect of, sec. 77, p. 575
statute requiring submission to fix time of award, effect of, sec. 77, pp. 575, 576
power to appoint umpire, sec. 77, p. 576
award when may be in parol, sec. 77, p. 576
statutory must conform to statute, sec. 77, p. 576
award must cover whole subject-matter submitted, sec. 77, p. 576
what must be shown to impeach for not including all, sec. 77, pp. 576, 577
submission of all matters in dispute, effect of, sec. 77, p. 577
whether award may be good in part and bad in part, sec. 77, p. 577
presumption in favor of award, sec. 77, p. 577
what court may receive and confirm award, sec. 77, p. 577
submission, providing it be made rule of court not having jurisdiction, whole proceeding void, sec. 77, p. 578
statute not complied with court has no jurisdiction, sec. 77, p. 578
but may be good as common law arbitration, sec. 77, p. 578
effect of failure to confirm, sec. 77, p. 578
parties may waive confirmation, sec. 77, p. 578
notice of time of confirmation necessary, sec. 77, p. 578
kind of notice required, sec. 77, p. 578
whether majority of arbitrators may make award, sec. 77, p. 579
effect of submission of pending action, sec. 77, pp. 579, 580
agreement to arbitrate does not deprive court of jurisdiction, sec. 77, p. 580
what necessary to authorize courts to render judgment on award, sec. 77, p. 580
appeal may be taken from such judgment, sec. 77, p. 580
reference of pending action to referee, effect of, sec. 77, p. 581
effect of judgment on award, sec. 77, p. 581
whether arbitrator must be sworn, sec. 77, p. 581

Arrest and Bail. (See Ne Exeat and Arrest and Bail.)

Arrest of Judgment—
when objection to jurisdiction presented by motion in, sec. 22, pp. 109, 112.

Assessment—
for public improvements, at what stage owner entitled to be heard, sec. 33, p. 220
statute making action conclusive without notice, void, sec. 33, p. 220
for taxes, general notice sufficient, sec. 33, p. 221.

Assignment of Errors. (See Appeals; Appellate Jurisdiction.)
when necessary to give appellate court jurisdiction, sec. 21, p. 101
is the pleading of the appellant, sec. 21, p. 101; sec. 85, p. 696
must be filed within time fixed by statute, sec. 21, p. 101
when party relieved from effect of failure to file in time, sec. 21, p. 101
when question of jurisdiction may be raised by, sec. 22, pp. 113, 114
rule different in federal and state courts, sec. 22, pp. 113, 114
is foundation and limitation of jurisdiction on writ of error, sec. 85, p. 696

Assistant Jurisdiction—
of courts of equity, sec. 9, pp. 25, 28 note 1
examination of witnesses *de bene esse*, discovery, perpetuation of testimony, sec. 9, p. 25; sec. 18, p. 74
superseded by statutory provisions and remedies, sec. 9, p. 25; sec. 18, pp. 74–76
courts of equity may aid courts of law by injunction, sec. 17, pp. 71, 72; sec. 18, p. 74
not concurrent jurisdiction, sec. 18, p. 18
when assistant jurisdiction will be exercised, sec. 18, p. 80
how far has been taken away by statutory remedies to be granted by law courts, sec. 18, pp. 74–81

Attachment—
in nature of but not strictly proceeding *in rem.*, sec. 14, p. 47; sec. 74, p. 518
levy of writ necessary to give jurisdiction over specific property, sec. 14, pp. 45, 46
essentially proceedings *in rem.* where defendant not personally served, sec. 14, p. 47
possession of property must be maintained or jurisdiction lost, sec. 14, p. 47
personal service within state on non-resident gives full jurisdiction, sec. 14, p. 48
seizure of property and notice to defendant both necessary, sec. 14 p. 48
jurisdiction over property limited to application of it to payment of debt, sec. 14, p. 48
only persons notified affected by judgment, sec. 14, p. 49
constructive notice allowed, sec. 14, p. 50
remedy unknown to common law, sec. 14, p. 50
defined, sec. 74, p. 518
not a common-law remedy, sec. 74, p. 518
originated in custom of foreign attachment in London, sec. 74, p. 518
at present day, remedy entirely statutory, sec. 74, p. 518
seizure of property alone not sufficient to authorize court to proceed, sec. 74, p. 518
notice also necessary, sec. 74, p. 518
in this, differs from custom of London, sec. 74, p. 519
no part of equity powers of court of chancery, sec. 74, p. 519
but conferred upon such courts by statute, sec. 74, p. 519
remedy is incidental to recovery of judgment in main action, sec. 74, p. 519
is denominated a provisional remedy, sec. 74, p. 519
if main action fails, attachment falls, sec. 74, p. 519
where defendant non-resident, not personally served, attachment fails, whole case at an end, sec. 74, p. 519

Attachment—*Continued.*
defendant non-resident, and constructive service, proceeding one *in rem.*, sec. 74, p. 519
and property attached alone subject to judgment, sec. 74, p. 519
in such case, attachment upholds main action, sec. 74, p. 520
attachment proceeding, how far independent of main action, sec. 74, p. 520
non-resident creditor may have attachment, sec. 74, p. 520
proceeding extraordinary and limited by statute, sec. 74, p. 520
and confined strictly within limits by courts, sec. 74, p. 520
how strictly statutes must be complied with, sec. 74, p. 520
requirements differ in different states, sec. 74, p. 520
when may issue, sec. 74, pp. 521, 523
general grounds, and showing upon which allowed, sec. 74, pp. 520, 521
1. *an action in which an attachment is allowed must be commenced and pending*, sec. 74, p. 521
what kinds of actions may be aided by, sec. 74, p. 522
generally confined to actions on contract, sec. 74, p. 522
includes actions for unliquidated damages, sec. 74, p. 522
but not so in some states, sec. 74, p. 522
sometimes where debt was fraudulently contracted, sec. 74, p. 522
and for damages for torts in some states, sec. 74, p. 523
what is action on contract, sec. 74, p. 523
commencement before time allowed, effect of, sec. 74, p. 523
2. *grounds upon which may issue, and affidavit necessary to sustain*, sec. 74, p. 523
grounds of, generally, sec. 74, pp. 523, 524
what affidavit must show, and how stated, sec. 74, pp. 524, 525
affidavit is foundation and support of jurisdiction, sec. 74, p. 526
failure to state essential fact, proceeding void, sec. 74, p. 526
but in some states amendments allowed, sec. 74, p. 526
defect in, distinguished from failure to make, sec. 74, p. 526
complaint and affidavit may be combined, when, sec. 74, p. 526
same affidavit may serve for attachment and publication, sec. 74, p. 527
whether seizure of property without notice gives jurisdiction, sec. 74, pp. 527, 528
what proceedings are jurisdictional, sec. 74, p. 528
different parts and elements of affidavit:
a. *by whom may be made*, sec. 74, pp. 528, 529
statutes differ, sec. 74, p. 528
under some must be made by plaintiff, sec. 74, p. 528
others may be by attorney or agent, sec. 74, p. 528
attorney must be authorized as such at time, sec. 74, p. 528
subsequent ratification insufficient, sec. 74, p. 528
under some statutes may be made by any credible person, sec. 74, p. 529
b. *averment of cause of action and amount due*, sec. 74, pp. 529, 530
must show cause of action in which attachment allowed, sec. 74, p. 529
amount due must be alleged, sec. 74, p. 529.
how amount due may be shown, sec. 74, p. 529
variance between complaint and affidavit as to amount due, effect of, sec. 74 p. 529
contract sued on need not show amount due on face, sec. 74, p. 529
but must be such that amount can be ascertained, sec. 74, p. 529

Attachment—*Continued.*
where parties may be sued jointly, but liable separately, for different amounts, amount due from each must be shown, sec. 74, pp. 529, 530
where required to show amount due over counter claim, necessary averments, sec. 74, p. 530
c. *presence of property within jurisdiction of court*, sec. 74, pp. 530, 531
affidavit must show in some of the states, sec. 74, p. 530
not making of affidavit but actual presence of property that gives jurisdiction, sec. 74, p. 530
therefore fact if alleged may be controverted, sec. 74, p. 530
allegation not always required, sec. 74, p. 530
but fact must exist, when, sec. 74, pp. 530, 531
d. *non-residence of the defendant*, sec. 74, p. 531
necessary to be shown in some states, sec. 74, p. 531
against joint debtors must show as to both, sec. 74, p. 531
e. *absconding debtors*, sec. 74, p. 531
concealment ground of attachment, sec. 74, p. 531
f. *fraudulent disposition or removal of property*, sec. 74, p. 531
usually allowed to be made on information and belief, sec. 74, p. 531
but grounds of belief sometimes require to be stated, sec. 74, p. 531
question one of fact to be determined on hearing, sec. 74, p. 531
must appear property subject to execution, when, sec. 74, pp. 531, 532
whether necessary to aver or not property must in fact be subject to execution, sec. 74, p. 532.
g. *concealment to avoid service of process*, sec. 74, p. 532
intention material, sec. 74, p. 532
therefore must show concealment with intent to avoid service, sec. 74, p. 532
but intent held not material in some states, sec. 74, p. 532
h. *debt fraudulently incurred*, sec. 74, p. 532
fraud must relate to time of making the contract, sec. 74, p. 532
and must have been perpetrated with intent to procure it, sec. 74, p. 532
what constitutes such fraud, sec. 74, p. 532
can not be maintained for several claims, part not fraudulent, sec. 74, p. 533
showing of negligence not sufficient, sec. 74, p. 533
but of embezzlement is, sec. 74, p. 533
i. *obligations criminally incurred*, sec. 74, p. 533
by commission of a crime is, sec. 74, p. 533
j. *where claim sued upon is not due*, sec. 74, p. 533
only allowed on showing that property about to be disposed of or removed, sec. 74, p. 533
specific grounds must be shown by affidavit, sec. 74, p. 533
non-residence alone not sufficient, sec. 74, p. 533
order of court authorizing issuance of writ, when necessary, sec. 74, p. 533
issued by clerk, without order, void, sec. 74, p. 533
k. *sources of information as to facts averred*, sec. 74, p. 533
when facts and circumstances showing knowledge must be stated, sec. 74, p. 534
l. *additional averments when made by attorney or agent*, sec. 74, p. 534
absence of plaintiff, sec. 74, p. 534

Attachment—*Continued.*
must be sustained by proof, sec. 74, p. 534
must show knowledge of facts, sec. 74, p. 534
3. *the bond or undertaking*, sec. 74, p. 534
giving of necessary to uphold attachment, sec. 74, p. 534
but not required in all cases, sec. 74, p. 534
failure to give held irregularity merely, sec. 74, p. 535
and does not affect jurisdiction, sec. 74, p. 535
held otherwise in some states, sec. 74, p. 535
by whom must be executed, sec. 74, p. 535
must comply with statute, sec. 74, p. 535
4. *the writ of attachment*, sec. 74, p. 535
in order to apply jurisdiction to particular property, must issue, sec. 74, p. 535
generally issued as of course by clerk, sec. 74, p. 536
when must issue, sec. 74, p. 536
what must contain, sec. 74, p. 536
statutes as to what shall contain, mandatory, sec. 74, p. 536
can not, without statutory authority, be amended, sec. 74, p. 536
5. *levy of writ and proof of its service*, sec. 74, p. 536
levy of, necessary to attach jurisdiction to property, sec. 74, pp. 536, 537
from that time property made subject to judgment, if rendered, sec. 74, p. 536
levy vests jurisdiction of subject-matter, sec. 74, p. 537
held in some cases question of levy not jurisdictional, sec. 74, p. 537
return of officer on, what must show, sec. 74, p. 537
where no personal service, jurisdiction limited to property levied on, sec. 74, p. 537
possession must be maintained, sec. 74, p. 537
levy and notice to non-resident both necessary, sec. 74, pp. 537, 538
when writ must be served, sec. 74, p. 538
time for service limited, effect of concealment of defendant, sec. 74, p. 538
no personal service, conditions subsequent to levy jurisdictional, sec. 74, p. 538
failure to comply with, renders judgment by default void, sec. 74, p. 538
6. *service of process on defendant*, sec. 74, p. 538
necessary to authorize judgment and disposition of property, sec. 74, p. 538
personal service on resident defendant generally required, sec. 74, p. 539
certain time given to obtain personal service, constructive before, void, sec 74, p. 539
federal courts, on foreign attachment, personal service necessary, sec. 74, p. 539
non-resident, constructive service authorized, sec. 74, p. 539
how constructive notice given, sec. 74, p. 539
if time for service limited by statute, service after, void, sec. 74, p. 539
difference in effect of personal and constructive service, sec. 74, p. 539
no personal judgment on constructive, sec. 74, pp. 539, 540
only authorizes sale of property attached, sec. 74, p. 540
failure to give notice, effect of, sec. 74, p. 540

Attachment—*Continued.*
discrepancy in decisions of federal and state courts as to necessity of notice, sec. 74, p. 540
effect of insufficient notice, sec. 74, p. 540
difference between no service and defective service, sec. 74, p. 541
writ of attachment as summons, effect of quashing, sec. 74, p. 541
when personal service of writ of attachment necessary, sec. 74, p. 541
failure to serve summons in time, effect on attachment, sec. 74, p. 541
7. *proof of service of process*, sec. 74, p. 541
jurisdiction does not depend upon, but upon service, sec. 74, p. 541
how proof must be made, sec. 74, p. 541
8. *waiver of defects in proceedings*, sec. 74, p. 542
appearance waived, sec. 74, p. 542
objecting on certain grounds, others waived, sec. 74, p. 542
appearance in main action, effect on attachment, sec. 74, pp. 542 543
giving delivery bond, effect of, as waiver, sec. 74, p. 544
and agreement that property may be sold, sec. 74, p. 544
special appearance, effect of, sec. 74, p. 544
9. *amendments*, sec. 74, p. 544
of attachment proceeding including affidavit authorized by statute, sec. 74, p. 544
what amendments allowed, sec. 74, p. 544
filing of new affidavit or bond permitted, sec. 74, p. 544
federal courts liberal in allowing, sec. 74, p. 544
must be something to amend. sec. 74, pp. 544, 545
void affidavit can not be amended, sec. 74, p. 545
can not add new cause of attachment, sec. 74, p. 545
return of officer may be amended, sec. 74, p. 545
10. *how sufficiency of proceedings may be tested*. sec. 74, p. 545
different modes of testing, sec. 74, pp. 545, 546
objection must be made before final judgment, sec. 74, p. 546
reason for the rule, sec. 74, p. 546
time of motion to set aside sometimes limited by statute. sec. 74, p. 547
11. *presumptions in favor of jurisdiction in attachment*, sec. 74, p. 547

Attorney—
want of authority of, to appear can not be shown collaterally, sec. 22, p. 121
unauthorized appearance by, effect of, sec. 13, p. 38
authority of, to appear presumed, sec. 13, p. 41
may act as judge, when, sec. 28, p. 182
courts have inherent power to punish for contempt, sec. 31, p, 198
extends to suspension and disbarment, sec. 31, p. 198
entitled to notice of proceeding to suspend or disbar, sec. 31, p. 199
causes for disbarment, sec. 31, p. 199
power to disbar inherent in courts, sec. 31, p. 200
but proceeding for, may be controlled by statute, sec. 31, p. 200
may be proceeded against summarily for indictable offense before conviction, sec. 31, p. 200
appearance may be by, sec. 34, p. 225
failure to indorse name of on summons, effect of, sec. 36, pp. 250, 251
not a *de facto* judge, when acting as such, sec. 60, p. 382
otherwise when irregularly appointed under proper authority, sec. 60, p. 382

Attorney—*Continued.*
when may pe appointed as special judge, sec. 61, p. 387
statutes authorizing held unconstitutional, sec. 61, p. 387
when may be restored as such, by mandamus, sec. 80, p. 624

Audita Querela. (See WRITS OF ERROR.)
means of relieving one from a judgment, sec. 84, pp. 670, 671
obsolete in most of the states, sec. 84, p. 671

B

Bailiff—
power of officer to appoint, sec. 37, p. 252
special, powers of, in service of process, sec. 37, p. 253

Bills and Writs of Review—
bill of review in equity similar to writ of error, sec. 87, p. 722
may be brought for error appearing on face of record, sec. 87, p. 722
when question must be determined by record, sec. 87, p. 723
bills in nature of review, objects of, sec. 87, p. 723
bills for impeachment of decrees for fraud, sec. 87, p. 723
proceedings have fallen into disuse in most of the states, sec. 87, p. 723
included in writs of error and *certiorari*, sec. 87, p. 723
writs of review provided for by statutes, sec. 87, pp. 723, 724
rules respecting *certiorari* apply to writs of review, sec. 87, p. 724
statutory remedies in the nature of, sec. 87, pp 723–725
when lies for newly-discovered evidence or new matter, sec. 87, p. 725
statutory, not applicable to decrees of divorce, sec. 87, p. 725
based on errors of law, what complaint under statutory proceeding must contain, sec. 87, p. 725
differs from action to annul judgment, how, sec. 87, p. 725
remedy by, does not supersede power to annul or set aside judgment, sec. 87, p. 726
how and where action to review brought and prosecuted, sec. 87, p. 726
bars appeal, sec. 87, p. 726
what judgments are subject to review by, under codes, sec. 87, p. 727
court of concurrent jurisdiction can not entertain, sec. 87, p. 727
decree under, can not be reviewed, sec. 87, p. 727

Bill of Exceptions—
when and where judge may settle, sec. 57, p. 372

Bills of Review. (See BILLS AND WRITS OF REVIEW.)

Bonds. (See MUNICIPAL BONDS; INJUNCTIONS.)
to stay proceedings on appeal, effect of, sec. 24, p. 150
in attachment, sec. 74, pp. 534, 535
in garnishment, sec. 75, p. 549
municipal, on what grounds court of equity will enjoin issuance or sale of, sec. 79, pp. 606–608

C

Cancellation—
of instruments within jurisdiction of courts of equity, sec. 9, p. 24

Certiorari—
when question of jurisdiction may be raised by, sec. 22, p. 112
defined, sec. 86, pp. 698, 699

Certiorari—*Continued.*
objects of, sec. 86, pp. 698–701, 712–717
whether right of appeal or writ of error will bar right to, sec. 86, pp. 698, 699
to what extent power to issue inherent and beyond legislative interference, sec. 86, p. 699
to what courts may issue, sec. 86, pp. 699–702
where remedy can not be had by writ of error, sec. 86, p. 700
definition given does not cover writ as at present used, sec. 86, p. 702
at common law was extraordinary legal remedy, sec. 86, p. 703
but has become to a great extent ordinary writ for correction of errors, sec. 86, p. 703
at what time may issue, sec. 86, pp. 703, 704
what relief may be granted under, sec. 86, p. 704
is remedial and not preventive, sec. 86, p. 704
in some states can only issue to test jurisdiction, sec. 86, p. 704
and not to correct errors, sec. 86, p. 704
but extends to jurisdiction of the person, sec. 86, pp. 704, 705
held may inquire whether lower court proceeded regularly and according to law, sec. 86, p. 705
meaning of "regularly and according to law," sec. 86, pp. 705, 706
what is meant by acting "illegally" under statutes authorizing writ on that ground, sec. 86, p. 707
strict limitation of the use of the writ in some cases, sec. 86, pp. 708, 709
trial without a hearing is an excess of jurisdiction, sec. 86, pp. 708, 709
distinction made between cases where is another remedy and those where there is none as to the extent of the remedy, sec. 86, p. 709
in many cases extended to review of questions of law, sec. 86, p. 710
and consideration of the evidence, sec. 86, p. 710
distinction made in this respect between courts and *quasi* judicial bodies, sec. 86, p. 710
and between courts acting summarily and when not, sec. 86, p. 710
right of appeal not absolute bar to, sec. 86, p. 711
allowed to serve purpose of writ of error where latter can not be resorted to, sec. 86, p. 711
or where right of appeal lost without fault, sec. 86, p. 711, 712
in some states has choice of resorting to writ or to appeal, or writ of error, sec. 86, p. 712
in others held can not be used as substitute for an appeal, sec. 86, p. 712
from what courts may issue, sec. 86, p. 712
confusion as to objects of writ by reason of statutes, sec. 86, pp. 712, 713, 714
liberal use of in some states, sec. 86, pp. 714, 715
conflict in the decisions as to the scope of the remedy, sec. 86, pp. 712–716
whether may be used to compel lower court to proceed with action, sec. 86, p. 716
writ of same name allowed to bring up part of record, sec. 86, p. 716
used in connection with *habeas corpus*, sec. 86, p. 717
bills of *certiorari* in chancery, objects of, sec. 86, p. 717
writ brings up entire record for review, sec. 86, p. 717
question must be determined by record, sec. 86, p. 717
when the evidence may be looked to, sec. 86, pp. 718, 719
general scope of the remedy, sec. 86, pp. 718–721

Certiorari—*Continued.*
can not be used to test legal existence of corporation, sec. 86, p. 721
issuance of in what sense within the discretion of the court, sec. 86, pp. 721, 722
right to may be lost by laches, sec. 86, p. 722
operates as a *supersedeas*, sec. 86, p. 722
can not be issued by judge at chambers, sec. 86, p. 722
what judgment may be rendered under, sec. 86, p. 722

Chambers. (See JUDGES.)
what powers judges have at, sec. 58, pp. 372–376

Chancery. (See COMMON LAW JURISDICTION, COURTS OF CHANCERY, EQUITY, EQUITY JURISDICTION, JURISDICTION.)

Change of Venue. (See VENUE.)
deprives court of jurisdiction, sec. 24, p. 151
power of court over records after, sec. 24, p. 152
by agreement of parties, effect of, sec. 24, p. 152
commencement of action in wrong place and its effects, sec. 45
at common law in local actions venue must be properly laid, sec. 45, p. 326
rule modified by statutes, sec. 45, p. 326
action in wrong county, party must demand change of venue, sec. 45, p. 326
appearance without objection when waives bringing in wrong county, sec. 45, p. 327
when application for change must be made, sec. 45, p. 327
failing to appear, party can not raise question, sec. 45, p. 327
where no statute authorizes change, what remedy may be had, sec. 45, p. 327
distinction between transitory and local actions, sec. 45, p. 327
in former, jurisdiction given by consent; in latter, not, sec. 45, p. 327
in latter, court has no jurisdiction if action brought in wrong county, sec. 45, p. 328
but legislature may change this rule, sec. 45, p. 328
statute requiring application for change in local actions, rule of waiver applies as in transitory actions, sec. 45, p. 328
held statute in general terms applies to local actions, sec. 45, p. 328
cases to contrary, sec. 45, p. 328
different rule in other states, sec. 45, p. 330
distinction applied to actions purely *in rem.*, sec. 45, p. 330
independent of statute, jurisdiction may be attacked without application for change, sec. 45, p. 331
actions made local by constitution, effect of, sec. 45, p. 331
statutes changing rule modify statutes fixing place of trial, sec. 45, p. 331
effect of application for change, sec. 45, p. 332
deprives court of jurisdiction, sec. 45, p. 332
right to have action brought in certain county, personal privilege, when, sec. 45, p. 332
and may be waived when, sec. 45, p. 332
action against several, any one may have change, sec. 45, p. 332
right to change, when absolute, sec. 45, p. 332
effect of constitution requiring actions to be *commenced* in certain county, sec. 45, p. 333
may be tried in other county, sec. 45, p. 333
distinction between jurisdiction of general subject-matter and particular cause of action, sec. 45, p. 333

Change of Venue—*Continued.*
action in wrong county can not be dismissed, when, sec. 45, p. 333
action on appeal when change may be had, sec. 45, p. 334
rule as to non-residence, sec. 45, p. 334
grounds of change of venue, sec. 46
are purely statutory, sec. 46, p. 334
different in different states, sec. 46, p. 334
enumerated, sec. 46, pp. 334, 335
effect on jurisdiction of different grounds, sec. 46, p. 335
when right to change, is absolute, effect of application for, sec. 46, p. 335
failure to make application, effect of, sec. 46, p. 335
disqualification of judge, effect of, sec. 46, pp. 335, 336, 342
no application for change necessary, sec. 46, p. 335
duty to decline to act, sec. 46, p. 335
application made, subsequent acts void, sec. 46, p. 336
bias or prejudice of inhabitants, jurisdiction not involved, sec. 46, p. 336
right of change for, whether absolute or not, sec. 46, p. 336
counter evidence may be given, sec. 46, p. 336
different rule in some states, sec. 46, p. 337
whether application, or order for change, ousts jurisdiction, sec. 46, p. 337
judge attorney for party, effect of, sec. 46, p. 337
what will constitute him such attorney, sec. 46, p. 337
judge witness in cause, effect of, sec. 46, p. 338
effect of joining cause removable with one not removable, sec. 46, p. 338
application for change and its effects, sec. 47
must be made within time fixed by statute, sec. 47, p. 338
subject to right to relief for excusable neglect, mistake, etc., sec. 47, p. 338
time for, fixed by rules of court, effect of, sec. 47, p. 338
cause not discovered until after time, effect of, sec. 47, p. 339
number of changes that may be had, sec. 47, p. 339
nature and form of, governed by statute, sec. 47, p. 339
what is usually required, sec. 47, pp. 339, 340
statute must be complied with, sec. 47, p. 340
more than statute requires can not be required by rule of court, sec. 47, p. 340
no vested right to, statute may be changed, sec. 47, p. 340
infant may make affidavit for, sec. 47, p. 340
affidavit may be amended, sec. 47, p. 340
what affidavit must contain, sec. 47, pp. 340, 341
when judge may take into account his own knowledge, sec. 47, pp. 341, 342
on ground of convenience of witnesses, when made, sec. 47, p. 342
fraudulently joining resident to give jurisdiction over non-resident, effect of, sec. 47, p. 342
other necessary proceedings to procure transfer, sec. 48
usually affidavit alone necessary, sec. 48, p. 343
but in some states written demand required, sec. 48, p. 343
payment of costs and transmission of papers, sec. 48, p. 343
pending performance of conditions after application, where jurisdiction rests, sec. 48, p. 343
in what cases conditions not imposed, sec. 48, p. 343
presumption that conditions not performed, when, sec. 48, p. 344

Change of Venue—*Continued,*
relief from failure to perform in time, sec. 48, p. 344
court can not impose conditions not required by statute, sec. 48, p. 344
waiver as to venue, sec. 49
right to trial in particular place may be waived, sec. 49, p. 344
distinction between transitory and local actions, sec. 49, p. 344
failure to apply for change in time waives, when, sec. 49, pp. 344, 345
when required to be made, sec. 49, p. 345
when may be renewed, sec. 49, p. 346
when objection may be made at the trial, sec. 49, p. 346
failure to comply with subsequent conditions, effect of, sec. 49, p. 346
defects in application, how waived, sec. 49, p. 346
consent to change waives application, sec. 49, p. 346
appearance in court to which action removed, effect of, sec. 49, p. 347
counter motion to retain case, sec. 50
action brought in wrong county, convenience of witnesses no defense to application for change, sec. 50, p. 347
counter motion to retain not proper, sec. 50, p. 347
when counter motion to retain may be considered, sec. 50, pp. 347, 348
when counter motion not necessary to retain case, sec. 50, p. 348
convenience of witnesses, when may be considered, sec. 50, p. 348
order for change and its effects, sec. 51
whether application or order divests court of jurisdiction, sec. 51, pp. 348, 349
depends upon ground of application and whether right is absolute, sec. 51, p. 349
if absolute, order made as of course, sec. 51, p. 349
and application terminates or suspends jurisdiction, sec. 51, p. 349
only suspends jurisdiction, when, sec. 51, p. 349
revived by failure to comply with subsequent conditions, sec. 51, p. 349
what vests jurisdiction in court to which transfer ordered, sec. 51, p. 349
power of courts from and to which change ordered, pending performance of conditions, sec. 51, p. 349
order, at what time vests court to which removed with jurisdiction, sec. 51, pp. 349, 350
failure to perform conditions, court making order may set it aside, sec. 51, p. 350
when appears from order that no legal cause for change, other court should refuse to act, sec. 51, p. 350
otherwise where facts authorizing do not exist but does not appear from record, sec. 51, p. 350
question as to cause for removal must be contested when application made, when, sec. 51, p. 350
when order does not transfer jurisdiction, sec. 51, pp. 350, 351
presumption that court acted rightly in granting change, sec. 51, p. 351
but if change not authorized under any circumstances, order granting a nullity, sec. 51, p. 351
proceedings defective, order erroneous only, sec. 51, p. 351
when order may be collaterally attacked, sec. 51, p. 351

Change of Venue—*Continued.*
when question on appeal one of law, sec. 51, pp. 351, 352
when order granting conclusive, sec. 51, p. 352
conditional order, when may be made, sec. 51, p. 352
when court may set aside order, sec. 51, p. 352
remanding cause, sec. 52
when order granting void no order remanding necessary, sec. 52, p. 352
and court to which transferred has no jurisdiction to remand, sec. 52, p. 352
court may be prevented from proceeding, sec. 52, p. 352
and court making order compelled to proceed, sec. 52, pp. 352, 353
held court may order re-transfer, sec. 52, p. 353
irregular transfer, how taken advantage of, sec. 52, p. 354

Citation. (See SUMMONS.)
defined, sec. 35, p. 238
does not differ materially from summons, sec. 35, p. 238
objects of, sec. 35, p. 238

Citizenship. (See NATURALIZATION.)
question of jurisdiction growing out of, how raised, sec. 22, p. 107
of corporations not changed by doing business in another state, sec. 43, pp. 323, 324

Collateral Attack. (See JURISDICTION, PRESUMPTIONS.)
that court had not jurisdiction of subject-matter may be raised collaterally, sec. 22, pp. 103, 112
difference between and direct attack, sec. 22, pp. 118–120
jurisdiction of court of general powers can not be question on, sec. 22, p. 120
foreign judgment, when subject to, sec. 22, p. 121
domestic judgment, when subject to sec. 22, p. 121; sec. 26
presumption in favor of jurisdiction in cases of, secs. 25, 26
of grant of letters of administration when can be made on, sec. 67, p. 456
whether proceedings for sale of real estate subject to, sec. 76, p. 560

Color of Title—
whether necessary to constitute a *de facto* officer, sec. 60, p. 379

Committee—
appearance may be made by, sec. 34, p. 225

Common Law. (See CHANCERY, COMMON-LAW JURISDICTION, COURTS, EQUITY, EQUITY JURISDICTION, JURISDICTION.)
courts of defined, sec. 1, p. 1
common-law courts in England, sec. 3, p. 3
superseded by supreme court of judicature, sec. 3, p. 3
common-law courts in United States, sec. 4, p. 5
constructive service of process in derogation of, sec. 13, p. 43
statutes in derogation of, to be strictly construed—rule abrogated, sec. 13, p. 43
constructive service unknown at, sec. 13, pp. 44
distinction between actions in and suits in equity abolished by the codes, sec. 9, p. 26
actions at, how question of jurisdiction raised, sec. 22, p. 107

Common-law Jurisdiction. (See COMMON LAW, EQUITY, EQUITY JURISDICTION.)
meaning of term, sec. 9, p. 28

Common-law Jurisdiction—*Continued.*
consolidated with equity jurisdiction in "civil action," of the code, sec. 9, pp. 23, 26
in federal and some of state courts kept separate, sec. 9, p. 23
differs from equity jurisdiction mainly in remedies administered, sec. 9, p. 23
how measured and limited, sec. 9, p. 24
concurrent with courts of chancery, sec. 9, p. 27
sometimes conferred by constitution or statute, sec. 10, p. 28
intermingled by statutes with equity, constitutional and statutory, sec. 65, p. 420
has been modified by statute, sec. 65, p. 420
courts of general jurisdiction usually vested with, sec. 65, p. 421
grant of, what includes, sec. 65, p. 421
distinction between and equity not so important as formerly, sec. 65, p. 422
common law adopted by some of the states, sec. 65, p. 423
statutes prevail over, sec. 65, p. 423
vested by constitution can not be taken away by statute, sec. 65, p. 423
no constitutional provision against it, may be changed at will, sec. 65, p. 423
presumed that it was the intention that the common law should prevail, sec. 65, p. 424
federal courts have none except as conferred by statute, sec. 65, p. 424
includes criminal cases, sec. 69, p. 479

Complaint. (See Jurisdiction, Pleadings.)
amendment of after service by publication, effect of on judgment by default, sec. 8, p. 22
controls in determining jurisdiction as to amount, sec. 16, p. 59
amount alleged in bad faith disregarded, sec. 16, p. 59
when question of jurisdiction may be raised by demurrer to, sec. 22, pp. 106–110
when aids affidavit for publication, sec. 38, p. 274
insufficiency of no ground for setting aside publication of notice, sec. 38, p. 279
filing, how time of affects validity of publication, sec. 38, p. 278
amendment of by making new parties, when service of process necessary, sec. 42, p. 305

Concurrent Jurisdiction. (See Courts, Exclusive Jurisdiction, Jurisdiction.)
defined, sec. 9, p. 28, note 1
constitution giving to one not exclusive, legislature may give concurrent to another court, sec. 17, p. 68; sec. 24, p. 146
two courts having, first taking has exclusive, sec. 17, p. 68
court of, no power to interfere with judgments of other court of same jurisdiction, sec. 17, p. 69
will not restrain proceedings in another court, sec. 17, p. 69
rule extends to process mesne and final, sec. 17, p. 69
but does not protect officer who goes beyond command of writ, sec. 17, p. 69
one court may aid another of concurrent jurisdiction, sec. 17, p. 71
occurs where party entitled to both legal and equitable relief, sec. 17, pp. 71, 72
when federal and state courts have, sec. 17, p. 73

Constable—
power of to appoint deputy, sec. 37, p. 254
power of deputy to serve process, sec. 37, p. 254
Constitutions—
of United States, provisions of, with reference to due process of law, sec. 33, p. 206
of states, contain similar provisions, sec. 33, p. 206
of United States, applies to states and courts, sec. 33, p. 206
not confined to judicial proceedings, sec. 33, p. 206
apply to laws enacted by congress, sec. 33, p. 207
amendment article 5 limits powers of congress and federal judiciary, not states, sec. 33, p. 207
what requires to constitute due process of law, sec. 33, pp. 211, 212
jurisdiction given by, can not be taken away by legislature, sec. 54, p. 355
Constitutional Jurisdiction—
jurisdiction conferred by constitution can not be taken away by legislature, sec. 17, p. 68; sec. 24, p. 146; sec. 54, p. 355
exclusive, can not be conferred by legislature on another court, sec. 17, p. 68
concurrent, may be conferred on other courts where not made exclusive, sec. 17, p. 68; sec. 24, p. 146
may be enlarged but not diminished by legislature, sec. 17, p. 68
of judges may be, sec. 54, p. 355
jurisdiction of superior courts generally fixed and defined by constitution, sec. 66, p. 426
generally done by conferring in all cases at law and in equity, sec. 66, p. 426
but sometimes specifically defined and limited, sec. 66, p. 426
the same as if conferred by statute, except can not be taken away by statute, sec. 66, p. 427
nor modified, limited or extended, sec. 66, p. 427
power of legislature where jurisdiction given by constitution, sec. 66, p. 427
effect of grant of jurisdiction in "cases at law" or "common-law jurisdiction," sec. 66, p. 427
what includes, sec. 66, p. 427
special proceedings and cases, what are, sec. 66, pp. 428, 429
distinction between and action or civil action not warranted, sec. 66, pp. 428, 429
jurisdiction given by constitution, but procedure not provided, court may provide, sec. 66, p. 431
power to issue writs given by constitution, objects of can not be changed by statute, sec. 66, p. 431
jurisdiction conferred by constitution not exclusive unless expressly made so, sec. 66, p. 431
and may be conferred concurrently on other courts by statute, sec. 66, p. 431
Constitutional Limitations—
division of powers of departments of state, sec. 29, p. 183
when acts of department void, sec. 29, p. 183
judicial department, what acts of other officers may enforce, sec. 29, p. 183
ministerial acts, sec. 29, p. 183
not acts involving judgment or discretion, sec. 29, p. 183
or executive or political acts, sec. 29, p. 183

Constitutional Limitations—*Continued.*
what are ministerial, executive, legislative, and judicial acts, sec. 29, pp. 184–187, 191
how far judicial may control legislative department, sec. 29, pp. 188, 191
how far departments independent, sec. 29, pp. 183, 191, 192
courts, how far controlled by legislative construction of laws, sec. 29, p. 193
appointment of officers executive act, sec. 29, p. 193
but other departments may appoint their own officers, when, sec. 29, pp. 193, 194
ministerial or legislative duties can not be imposed upon courts, sec. 29, p. 194
nor judicial duties on any but courts and judicial officers, sec. 29, p. 194
whether law constitutional, courts must determine, sec. 29, p. 195

Constructive Authority. (See INHERENT POWERS.)

Constructive Notice. (See CONSTRUCTIVE SERVICE OF PROCESS.)
definition of, sec. 38, p. 266
when authorized and how given, sec. 38, p. 266

Constructive Service of Process—
distinguished from personal service, sec. 13, p. 41
will not authorize a personal judgment, sec. 13, p. 42
when is effective, sec. 13, p. 42
statute authorizing, must be strictly complied with, sec. 13, p. 43
unknown at common law, sec. 13, p. 44
personal service out of the state is constructive, sec. 13, p. 42
complaint can not be amended after, sec. 13, p. 42
presumptions of jurisdiction in cases of, sec. 25. (See PRESUMPTIONS.)
when authorized, sec. 33, pp. 213–217
who may determine when such necessity exists as should authorize, sec. 33, pp. 213–217
meaning of, sec. 38, p. 266
includes personal service out of state, sec. 38, p. 266
is exceptional mode of service, sec. 38, p. 266
statutes authorizing, must be complied with, sec. 38, p. 266
division of the subject, sec. 38, p. 266
a. *in what cases allowed*, sec. 38, p. 267
under control of the states, sec. 38, p. 267
general rule, personal action can not be maintained on, sec. 38, p. 267
either against resident or non-resident, sec. 38, p. 267
personal judgment, what is, sec. 38, p. 268
allowed in actions *in rem.* and attachment, sec. 38, p. 269
but relief confined to property, sec. 38, p. 269
seizure of property generally necessary, sec. 38, p. 270
and notice, sec. 38, p. 270
allowed in cases to enforce specific liens on property within jurisdiction, sec. 38, p. 270
as in case of mortgage on real or personal property, sec. 38, p. 270
proceedings affecting title to real estate, sec. 38, p. 270
to set aside fraudulent conveyances, sec. 38, p. 270
actions to quiet title, sec. 38, p. 270
to abate nuisances, sec. 38, p. 270
to establish trusts in real estate, sec. 38, p. 270

Constructive Service of Process—*Continued.*
in such cases, jurisdiction depends upon presence of property, sec. 38, p. 270
and personal judgment can not be rendered, sec. 38, p. 270
allowed in cases affecting *status* of parties, as in divorce, sec. 38, p. 270
but can be no personal judgment on, as for alimony, sec. 38, p. 270
independent of statute courts can not authorize, sec. 38, p. 271
courts of equity when may authorize service on other person for non-resident, sec. 38, p. 271
b. *the affidavit*, sec. 38, p. 271
making of is jurisdictional, sec. 38, p. 271
what must be shown by, sec. 38, pp. 271, 272
may be sufficient to give jurisdiction but defective and subject to direct attack, sec. 38, p. 272
what must contain governed by statute, sec. 38, pp. 272, 273
but every step required may be taken and yet service be void, when, sec. 38, pp. 272, 273
how fact of non-residence may be established, sec. 38, p. 273
facts required to be stated in can not be supplied by other evidence, sec. 38, p. 273
held not to be part of judgment roll, sec. 38, pp. 273, 274
and that was made will be presumed, sec. 38, p. 274
must appear from that case is one for constructive notice, when, sec. 38, p. 274
when complaint may be looked to for cause of action, sec. 38, pp. 274, 275
general statement of cause of action sufficient, sec. 38, p. 275
not always sufficient to follow language of statute, sec. 38, p. 275
diligence to find defendant for personal service, what showing of necessary, sec. 38, pp. 275, 276, 277
facts as to what was done must be stated, sec. 38, p. 275
but any facts tending to show gives court jurisdiction to determine question, sec. 38, p. 275
what constitutes due diligence can not be definitely stated, sec. 38, pp. 275, 276
allegation of property within jurisdiction, how must be made, sec. 38, p. 276
what may be stated on information and belief, sec. 38, p. 276
that defendant is out of state must be positive and direct, sec. 38, p. 276
absence from state what sufficient, sec. 38, pp. 276, 277
strictness required in stating nature of action, sec. 38, p. 277
name of party to be published against necessary, sec. 38, p. 277
except where defendant may be sued under fictitious name, sec. 38, p. 277
then must be shown that true name is unknown, sec. 38, p. 277
false statement of cause of action in, effect of, sec. 38, p. 277
does not affect jurisdiction of court, sec. 38, p. 278
of non-residence must relate to time of order for publication, sec. 38, p. 278
how near the time must be made, sec. 38, p. 278
need not be made at time complaint is filed, sec. 38, p. 278
in some states complaint must be filed *after* proof of publication, sec. 38, p. 278
and if filed before judgment void, sec. 38, p. 278
when affidavit may be amended, sec. 38, p. 279

Constructive Service of Process—*Continued.*
difficulty of making personal service no ground for publication sec. 38, p. 279
insufficiency of complaint not ground for attacking notice, sec. 38, p. 279
c. *officers return as basis for publication*, sec. 38, p. 279
facts necessary for, when may be shown by, sec. 38, p. 279
what must be shown by, sec. 38, p. 279
d. *order of publication*, sec. 38, p. 280
must require all acts to be done that statute requires, sec. 38, p. 280
is the authority for making the service, sec. 38, p. 280
and proper service without necessary order therefor is void, sec. 38, p. 280
what order must contain, sec. 38, pp. 280, 281
e. *the publication*, sec. 38, p. 281
what must be, governed by statute, sec. 38, p. 281
in some states summons published, sec. 38, p. 281
in others notice containing its substance, sec. 38, p. 281
irregularities do not render void, sec. 38, p. 281
but distinction in this respect between personal and constructive service, sec. 38, pp. 281, 282
publication for less than required time, effect of, sec. 38, pp. 282, 283
rule in cases of petition by guardian for sale of ward's property, sec. 38, p. 283
petition said to give jurisdiction in such cases, sec. 38, p. 283
relief demanded, of which notice is given, limits jurisdiction to granting such relief, when, sec. 38, p. 284
death of defendant pending publication, new notice necessary, sec. 38, p. 284
where publication measured by months, calendar months meant, sec. 38, p. 284
what is sufficient length of time for publication, sec. 38, p. 284
f. *proof of publication*, sec. 38, p. 284
validity of judgment does not depend upon, sec. 38, p. 284
but upon fact of publication, sec. 38, p. 284
therefore may be supplied after judgment, sec. 38, p. 285
and may be amended, sec. 38, p. 285
failure to make is irregularity merely, sec. 38, p. 285
but judgment void on face, right to supply or amend subject to intervening rights, sec. 38, p. 285
facts of publication may be established, how, sec. 38, p. 285
by whom affidavit may be made, sec. 38, p. 285
warning order takes place of summons, and proof the place of officer's return, sec. 38, p. 286
facts appearing in, by way of recital, effect of, sec. 38, p. 286
after many years, slight proof sufficient, sec. 38, p. 286
g. *personal service out of state*, sec. 38, p. 286
is constructive service, sec. 38, p. 286
and allowed on like showing as for publication, sec. 38, p. 286
and usually length of service the same, sec. 38, p. 286

Contempts. (See Inherent Powers.)
courts have inherent power to punish for, sec. 27, pp. 174, 181
may be limited by law, sec. 27, p. 174
for what purposes power exercised, sec. 27, p. 175

Contempts—*Continued.*
whether judgment for, can be reviewed, sec. 27, p. 175
two kinds of, sec. 27, p. 177
direct and constructive, defined, sec. 27, p. 177
jurisdiction in cases of, does not depend upon express law, sec. 72, p. 488
is a part of inherent powers of courts, sec. 72, p. 488
can not be taken away by legislature, sec. 72, p. 488
rule applies to constructive contempts, sec. 72, p. 489
but legislature may limit and control, sec. 72, p. 490
power usually given and provided for by statute, sec. 72, p. 490
power not confined to courts, sec. 72, p. 490
to what extent legislative bodies may exercise, sec. 72, pp. 490, 491
as respects the congress of the United States, sec. 72, p. 491
jurisdiction depends on character of contempt, sec. 72, p. 491
may be contempt at common law or made so by statute, sec. 72, p. 492
civil contempts, what are, sec. 72, p. 492
do not authorize imprisonment for debt, sec. 72, p. 492
imprisonment until debt paid is one for debt and unlawful, sec. 72, p. 492
no showing or affidavit necessary in direct contempt, sec. 72, p. 492
court may proceed summarily on its own knowledge, sec. 72, p. 492
in case of constructive affidavit generally required, sec. 72, p. 492
court no jurisdiction to act without, sec. 72, p. 492
must allege facts constituting contempt, sec. 72, p. 493
return of officer sometimes sufficient without affidavit, sec. 72, p. 493
but *prima facie* case must be so made as to constitute part of record, sec. 72, p. 493
affidavit on information and belief, judgment not void, sec. 72, p. 493
held jurisdiction does not depend on form of affidavit, sec. 72, p. 493
but not in accordance with rule requiring affidavit, sec. 72, p. 493
effect of judgment, whether conclusive and final or not, sec. 72, p. 493
better rule is that is open to review on appeal, sec. 72, pp. 493, 494
jurisdiction of court or general power to punish for, always open to inquiry, sec. 72, p. 494
whether facts in particular case constitute contempt, held not jurisdictional question, sec. 72, p. 495
but cases conflicting, sec. 72, p. 495
when accused will be discharged on *habeas corpus*, sec. 72, p. 495
legislative bodies acts not conclusive, sec. 72, p. 495
because not courts, sec. 72, pp. 495, 496
power to punish own members exclusive and not subject to review, sec. 72, p. 496
extends to other persons, when, sec. 72, p. 496
as to other persons, power not granted to congress, sec. 72, p. 496
committed in presence of court, notice not necessary, sec. 72, p. 496
but opportunity to explain must be given, sec. 72, p. 496
facts recited in commitment conclusive on collateral attack, sec. 72, p. 496
when existence of jurisdictional facts presumed, sec. 72, p. 496
finding of facts by court conclusive, sec. 72, pp. 496, 497
out of presence of court notice necessary, sec. 72, p. 497
what notice required, sec. 72, p. 497
requirements of statute may be waived, sec. 72, p. 497
what are jurisdictional facts, sec. 72, p. 498

Contempts—*Continued.*
fact that may be prosecuted by indictment does not affect jurisdiction, sec. 72, p. 498
is exclusive in court against which offense committed, sec. 72, p. 498
sole power of federal courts derived from statutes, sec. 72, p. 499
would not be so if statute did not cover all inherent powers. sec. 72, p. 499
but statute effective to limit power, sec. 72, p. 499
whether power of United States supreme court can be limited by statute, sec. 72, p. 499
rule as to territorial courts, sec. 72, pp. 499
and as to inferior courts, sec. 72, pp. 499, 500
except as to legislative bodies power confined to judges and courts, sec. 72, p. 500
when town council has power, sec. 72, p. 501
as to the power of notaries public, sec. 72, p. 501
powers of courts greatly extended, sec. 72, p. 501
that court has jurisdiction of cause does not give it of contempt, sec. 72, p. 502
depends upon showing in contempt proceeding, sec. 72, p. 502
distinction between civil and criminal contempts, sec. 72, p. 502
court having law and equity side, how contempt proceeding docketed, sec. 72, p. 502
sometimes held part of original case, sec. 72, p. 503
no jurisdiction to make order, none to punish for violating it, sec. 72, p. 503
failure to attend as witness before notary, how punished, sec. 72, p. 503
power to strike out pleading, what must be shown, sec. 72, p. 504
where offense in presence of court must proceed without delay, sec. 72, p. 504
final judgment terminates jurisdiction, sec. 72, p. 504

Corporations. (See JURISDICTION, PROCESS, SERVICE OF PROCESS.)
citizenship of, sec. 15, p. 56
federal court can not obtain jurisdiction of property of in other district by appointment of receiver, sec. 15, p. 57
foreign on whom service of summons may be made, sec. 13, p. 43
for purposes of jurisdiction are citizens of states creating them, sec. 15, p. 56
but held are also citizens of states in which are doing business, sec. 15, p. 56
created by laws of several states, citizens of either, sec. 15, p. 57
owning property in different states, appointment of receiver in one does not bring all property within jurisdiction of courts, sec. 15, p. 57
insolvents' property in different states may, by statute, be brought within jurisdiction of court appointing receiver, sec. 15, p. 58
how served with process, sec. 43, pp. 308–324. (See SERVICE OF PROCESS.)
when may be sued in foreign states, sec. 43, p. 308
in what respect not a citizen, sec. 43, p. 310
on whom service of process may be made for, sec 43, p. 313
return of officer as to whom service was made upon, sec. 43, p. 316
meaning of "station agent," sec. 43, p. 316
and of "general agent," and "managing agent," sec. 43, p. 317
doing business within foreign state, what will subject to be sued, sec. 43, pp. 319, 320
in federal courts where may be served, sec. 43, pp. 321–323

Corporations—*Continued.*
is inhabitant of state of its creation, sec. 43, p. 321
created by act of congress, where is an inhabitant, sec. 43, p. 323
may be sued and served in any state where doing business, sec. 43, p. 323
doing business in another state does not change citizenship of, sec. 43, pp. 323, 324
power of courts over by *quo warranto*, sec. 83, pp. 659–670. (See Quo Warranto.)

Costs—
excluded in fixing jurisdiction as to amount, sec. 16, p. 60
what constitutes costs, sec. 16, p. 61
payment of on change of venue necessary to divest court of jurisdiction sec. 24, p. 152; sec. 48, p. 343

Counter Claim—
setting up does not affect jurisdiction as to amount, sec. 16, p. 63

County. (See Change of Venue, Venue.)
action brought in wrong, objection how waived, sec. 20, p. 115
division of, effect of on jurisdiction of court, sec. 24, p. 147

Courts. (See Common Law, Equity, Judges, Jurisdiction, Supreme Court of Judicature, Terms of Court.)
defined, sec. 1, p. 1
judges of not necessarily the court, sec. 1, p. 1
to constitute court judges must be in discharge of duties of at time and place prescribed by law, sec. 1, p. 1; sec. 19, p. 81
presence of clerk or prothonotary necessary to constitute, sec. 1, p. 2
court of common law defined, sec. 1, p. 1
general division of, sec. 2, p. 2
1. common law and equity,
2. military and maritime,
3. of record and not of record,
4 of superior and general, or of inferior and special jurisdiction, sec. 2, p. 2
common law and equity courts in England, sec. 3, p. 3
superseded by supreme court of judicature, sec. 3, p. 3
admiralty, ecclesiastical, probate, divorce and bankruptcy courts consolidated in supreme court of judicature, in England, sec. 3, p. 3
common law and equity courts in the United States, sec. 4, p. 5
several kinds of courts in the United States, sec. 4, p. 5
federal courts, different kinds, sec. 4, p. 6
supreme court has original jurisdiction to limited extent both at law and in equity, sec. 4, p. 6
military and maritime courts, jurisdiction of, sec. 5, p. 6.
courts of record, what constitutes, sec. 6, pp. 7–10
defined, sec. 6, p. 7.
courts of general and superior and of inferior and special jurisdiction distinguished, sec. 7, pp. 10–15
nature of federal courts in this respect, sec. 7, p. 12
of limited and of special jurisdiction distinguished, sec. 7, p. 10
will not act if no real controversy, sec. 12, p. 33
appellate, what determines jurisdictional amount, sec. 16, p. 64
of concurrent jurisdiction, one first taking cognizance of action retains, sec. 17, p. 68
of concurrent jurisdiction, can not interfere with each other's decrees or processes by injunction or otherwise, sec. 17, p. 69

Courts—*Continued.*
how far one may exercise jurisdiction over property seized under process from another, sec. 17, p. 71
seizing property *in rem.* generally has exclusive jurisdiction, sec. 17, p. 72
federal and state have concurrent jurisdiction, sec. 17, p. 73
jurisdiction of, may be ousted by creation of new court, sec. 17, p. 73
time and place for sitting of, fixed by statute, sec. 19, p. 81
proceedings of, at wrong time and place, void, sec. 19, p. 81
sessions of, usually presumed legal, sec. 19, p. 82
where three judges necessary to constitute, and only two hear argument, third may sit at decision to render proceedings valid, sec. 19, p. 87
where given discretionary powers, no other can interfere with exercise of, sec. 20, p. 93
of equity, how question of jurisdiction raised in, sec. 22, p. 107
when may dismiss action on own motion, sec. 22, p. 111
may entertain jurisdiction or not at discretion, when, sec. 22, p, 111
of equity, when ill prevent enforcement of judgment by injunction, sec. 22, p. 14
how may be deprived of jurisdiction, sec. 24, p. 146
by law, sec. 24, p. 146
constitutional not by statute, sec. 24, p. 146
nor inherent powers, sec. 24, p. 146
but subject to regulation, sec. 24, p. 146
not by agreement of the parties, sec. 24, p. 146
when may be made concurrent with another, sec. 24, p. 146
by conferring exclusive on another, sec. 24, pp. 146, 147
right to, how limited by constitution, sec. 24, p. 147
by change of county, sec. 24, page 147
by repeal of statute under which created, sec. 24, p. 147
by failure to do act necessary to perpetuate or continue, sec. 24, pp. 147–150
by failure to act in time, sec. 24, pp. 148, 149
by failure to render judgment in time, sec. 24, p. 149
distinction between rendition and entry of judgment, sec. 24, p. 149
by failure to adjourn to proper time, sec. 24, p. 149
by unauthorized adjournment, sec. 24, p. 149
by appeal or writ of error, sec. 24, p. 150
how far appeal or writ suspends operation of judgment, sec. 24, pp. 150, 151
bond to stay proceedings usually required, sec. 24, p. 150
effect of such bond, sec. 24, p. 150
by change of venue, sec. 24, pp. 151–153
by removal of cause from state to federal court, sec. 24, p. 153
by raising issue not within jurisdiction, sec. 24, pp. 151, 152
by losing custody of property or failing to give notice, sec. 24, p. 154
suspended between terms, and when judges not present, sec. 24, p. 154
by exhausting jurisdiction, sec. 24, p. 155
not by act of parties, sec. 24, p. 155
or change of facts or condition of parties or subject-matter, sec. 24, p. 155
presumptions in favor of jurisdiction of, sec. 25. (See PRESUMPTIONS.)
in case of court of general jurisdiction, sec. 25, pp. 155, 156; sec. 26, pp. 168, 169

Courts—*Continued.*
in case of special, exercised by court of general jurisdiction, sec. 25, pp. 156, 157
where acting in mode prescribed by statute and not according to course of common law, sec. 25, pp. 158–161
of proceedings of domestic courts, sec. 25, pp. 162, 163; sec. 26, pp. 168, 169
of foreign courts, sec. 25, p. 163; sec. 26, pp. 168–170
none against the record, sec. 25, p. 163
effect of recitals in records of, sec. 25, pp. 163, 164, 165; sec. 26, pp. 168, 169
that jurisdiction obtained was properly exercised, sec. 25, p. 167
inherent powers of, sec. 27
enumerated, sec. 27, p. 170
sometimes denominated incidental powers, or constructive authority, sec. 27, pp. 172, 173
necessary to proper discharge of duties, sec. 27, pp. 173, 177
can not be taken away by legislature, sec. 27, p. 174
may be limited and controlled, sec. 27, p. 174
in case of contempts, sec. 27, p. 174
whether judgment of, may be reviewed, sec. 27, pp. 175, 176
to make rules, sec. 27, p. 177
to amend its records, sec. 27, p. 181
to disbar and otherwise punish attorneys, sec. 31, pp. 198–201
illegal courts—
acts of, void, sec. 28, p. 181
de facto courts—
powers of, sec. 28, p. 181; sec. 60, pp. 379–386
what constitutes, sec. 28, pp. 181–183; sec. 60, pp. 379–386
acts of, not void, sec. 60, p. 383
constitutional limitations of powers of, sec. 29
may enforce or prevent performance of ministerial duties or acts of officers of other departments, sec. 29, pp. 183, 184
but not acts calling for exercise of judgment or discretion, sec. 29, pp. 183, 193
or executive or political acts, sec. 29, p. 183
ministerial act, what is, sec. 29, pp. 185, 186, 187
judicial act defined, sec. 29, p. 185
legislative power defined, sec. 29, pp. 186, 193
what are executive duties, sec. 29, pp. 186, 193
how far courts may regulate legislative acts, sec. 29, pp. 188–191
departments of state, how far independent, sec. 29, p. 191
constitutional limits to be determined by courts, sec. 29, p. 191
courts may appoint their own officers, sec. 29, p. 194
whether law constitutional courts must determine, sec. 29, p. 195
ministerial acts can not be imposed upon courts, sec. 29, p. 194
summary jurisdiction of, sec. 30. (See SUMMARY JURISDICTION.)
regulated by statute, sec. 30, p. 196
except inherent powers, sec. 30, p. 197
control of attorneys by, sec. 31
attorneys officers of court, sec. 31, p. 198
courts have inherent power to punish, sec. 31, p. 198
and to suspend or disbar, sec. 31, p. 198
legislature may regulate exercise of power, sec. 31, p. 198
statutory proceedings must be followed, sec. 31, p. 198
attorney may be punished for contempt, how, sec. 31, p. 199

Courts—*Continued.*
may be proceeded against summarily for indictable offense, sec. 31, p. 200
and before prosecution therefor commenced, sec. 31, p. 200
pardon for offense does not affect the power to disbar, sec. 31, p. 201
state court may disbar for offense before federal court, sec. 31, p. 201
difference between disbarment and striking name from rolls, sec. 31, p. 201
when act on discretion without evidence notice not essential, sec. 33, p. 203
notice necessary to vest with jurisdiction, sec. 33, pp. 213, 214
personal within the state, when necessary, sec. 33, p. 214
legislature can not deprive party of right to resort to, sec. 33, p. 222
but may regulate time and manner of seeking remedy in, sec. 33, p. 222
appellate, how notice given of appeal, sec. 35, p. 239
can not order service of process beyond territorial jurisdiction, sec. 38, p. 271
can not act out of, sec. 57, p. 370
two judges can not act at same time, when, sec. 57, p. 370
constitutional jurisdiction of, sec. 66, p. 426
how conferred, sec. 66, p. 426
can not be taken away, changed or modified by statute, sec. 66, p. 427
meaning of "cases at law" and "common-law jurisdiction," as conferred by, sec. 66, p. 427
special proceedings or cases do not belong to, sec. 66, pp. 428, 429
when court may provide mode of procedure, sec. 66, p. 430
objects of writs authorized to be issued can not be changed by statute, sec. 66, p. 431
probate jurisdiction of, sec. 67, pp. 431–460. (See PROBATE JURISDICTION.)
to what courts belong, sec. 67, p. 431
more broad and ample under statutes, sec. 67, p. 432
whether is special and inferior, sec. 67, pp. 433–438
orders and decrees made in exercise of, conclusive, sec. 67, pp. 437, 438
what included in term probate matters, sec. 67, pp. 439–442
to what extends, sec. 67, pp. 439–452
upon what the jurisdiction depends, sec. 67, pp. 452–454
what petition or other pleading must show to give, sec. 67, p. 454
finding of jurisdictional facts, effect of, sec. 67, p. 455
maritime jurisdiction of, sec. 70, p. 483. (See ADMIRALTY AND MARITIME JURISDICTION.)
what have of divorce cases, sec. 73, pp. 504, 505. (See DIVORCE.)
jurisdiction of, in injunctions, sec. 79, pp. 588–614
when will be compelled to act by mandamus, sec. 80, pp. 620–623
when prevented from acting by prohibition, sec. 81, pp. 627–638
how far acts of, may be inquired into by *habeas corpus*, sec. 82, pp. 640–643
powers of, to grant new trials and vacate judgments, sec. 84, pp. 670–692
jurisdiction of, in *certiorari* proceedings, sec. 86, p. 698
Courts of Chancery. (See COURTS OF EQUITY.)

Courts of Equity. (See Common Law; Common-Law Jurisdiction; Courts; Equity; Equity Jurisdiction; Jurisdiction.)
jurisdiction of, sec. 9, p. 23
consolidated with common-law courts, sec. 9, pp. 23, 26
but separate jurisdiction of, maintained in federal and some of state courts, sec. 9, p. 23
jurisdiction of, differs from common law mainly in remedies administered, sec. 9, p. 23
is preventive, sec. 9, p. 24
can not be stated accurately, sec. 9, p. 24
principle cases of exclusive jurisdiction, sec. 9, p. 24
is divided into ordinary and extraordinary, sec. 9, p. 25
what gave rise to jurisdiction of, sec. 9, p. 24
jurisdiction of, concurrent with courts of law in some cases, sec. 9, p. 27; sec. 17, p. 71
actions formerly cognizable in, become statutory, sec. 9, p. 27
and superseded by statutory remedies, sec. 9, p. 27
may aid courts of law by injunction, sec. 17, pp. 72–74
assistant jurisdiction of, sec. 18, p. 74. (See Assistant Jurisdiction.)
not concurrent, sec. 18, p. 74
how far superseded and taken away by statutory remedies, sec. 18, pp. 74–81
question of jurisdiction in, how raised, sec. 22, pp. 107, 108
when will prevent enforcement of judgment by injunction, sec. 22, p. 114
can not order service of process out of jurisdiction, sec. 38, p. 271
power to order service on another for non-resident defendant, sec. 38, p. 271
jurisdiction of, in probate matters, sec. 67, pp. 431–460
power of, to enjoin collection of taxes, sec. 79, pp. 601–606
to enjoin issuance or sale of municipal bonds, sec. 79, pp. 606–608
to enjoin judicial proceedings, sec. 79, pp. 608–612.
to enjoin action by public officer, sec. 79, pp. 612, 613
have no jurisdiction in matters criminal or immoral not affecting property, sec. 79, p. 614
when will exercise jurisdiction to grant new trials or vacate judgments, sec. 84, pp. 682–688

Courts of Record—
what constitutes, sec. 6, pp. 7–10
defined, sec. 6, p. 7

Creditors' Bill—
original plaintiff's claim sufficient to give jurisdiction, others of less amount may come in, sec. 16, p. 63.

Criminal Jurisdiction—
controlled by express statutory and constitutional provisions, sec 69, p. 469
distinction between civil and criminal as to what gives jurisdiction, sec. 69, p. 470
place where crime committed, determines, sec. 69, p. 470
party in one state may commit crime in another, sec. 69, p. 570
therefore party need not be in state where committed to give jurisdiction, sec. 69, p. 470
accessory before fact in another state can not be punished in state where crime committed, sec. 69, p. 470
answerable in state where he acted, sec. 69, p. 470
jurisdiction is where crime was completed, sec. 69, p. 470

Criminal Jurisdiction—*Continued.*
and not where some act constituting part of it was committed, sec. 69, p. 470.
different rule under statutes in some states, sec. 69, p. 471
absence of statute jurisdiction where crime consummated, sec. 69, p. 471
states may pass laws making its citizens liable for acts done out of state, sec. 69, p. 471
proceedings for apprehending criminal out of state jurisdiction ancillary to that of courts where offense was committed, sec. 69, p. 471
how such jurisdiction brought into action, sec. 69, p. 471
statute authorizing must be strictly pursued, sec. 69, p. 471
jurisdiction of state courts over offenses committed by Indians, sec. 69, p. 471.
means by which defendant is brought into state, does not affect jurisdiction to try him, sec. 69, p. 472
legality of extradition proceedings does not affect, sec. 69, p. 472
but treaties may limit jurisdiction, sec. 69, p. 472
extradited for one crime can not be tried for another, sec. 69, p. 472
extradition from foreign country must be through federal government, sec. 69, p. 472
federal courts may protect accused from trial in state court, when, sec. 69, p. 472
brought to this country by force and not by virtue of treaty federal courts can not interfere with trial in state court, sec. 69, p. 472
accused must be before court, service of process not sufficient, sec. 69, p. 473
actual presence sometimes dispensed with by statute, sec. 69, p. 473
place where offense committed must be alleged in indictment, sec. 69, p. 473
and where jurisdiction of court extends over part of county must allege committed in that part, sec. 69, p. 473
otherwise sometimes by statute, sec. 69, p. 473
whether offense committed within jurisdiction, question of fact for jury, sec. 69, p. 473
controverted by plea of not guilty, sec. 69, p. 473
and burden of proof on prosecution, sec. 69, p. 473
finding of facts necessary to give jurisdiction conclusive on collateral attack, sec. 69, p. 473
but proof of venue necessary to sustain on appeal, sec. 69, pp. 473, 474
how question of may be raised, sec. 69, p. 474
where statute gives jurisdiction after designated time, effect of taking before time expires, sec. 69, p. 474.
when authorized to issue warrant on evidence of guilt, effect of issuing without, sec. 69, p. 475
affidavit expressing opinion not sufficient evidence, sec. 69, p. 475
exceptions to rule that must be tried in county where offense committed, sec, 69, p. 475
crime of larceny and like offenses where property stolen, or in county where property found, sec. 69, p. 475
so where property brought from another state, sec. 69, p. 475
and where offense committed partly in different counties, sec. 69, p. 475
murder, usually where fatal blow was struck although death occurred elsewhere, sec. 69, p. 475
statutes authorizing constitutional, sec. 69, pp. 475, 476

Criminal Jurisdiction—*Continued.*
so of statute authorizing trial where death occurred wound inflicted on high seas, sec. 69, p. 476
property taken into county may be alleged to have been stolen there, sec. 69, p. 476
asportation from one county to another new theft, sec. 69, p. 476
different rule in charge of burglary which is local crime, sec. 69, p. 476
held legislature can not authorize prosecution of burglary in another county, sec. 69, p. 476
effect of statute authorizing prosecution in county where acts or *effects* of acts occur, sec. 69, p. 477
statute authorizing prosecution of offense committed in another state held void, sec. 69, p. 477
but authorities disagree, sec. 69, p. 477
wound inflicted in one state and death in another where jurisdiction rests, sec. 69, p. 477
law requiring trial in county where crime committed rests upon right to jury of the neighborhood, sec. 69, p. 478
subject to right to change of venue, sec. 69, p. 478
right to trial by jury of county can not be taken away by statute, sec. 69, p. 478
statute authorizing change of venue by district attorney without defendant's consent unconstitutional, sec. 69, p. 478
change of venue, how court obtains jurisdiction, sec. 69, p. 479
when court from which removed loses jurisdiction, sec. 69, p. 479
criminal action is one at law, sec. 69, p. 479
and grant of jurisdiction in cases at law confers jurisdiction of, sec. 69, p. 479
given by constitution can not be taken away by statute, sec. 69, p. 479
but if not made exclusive, concurrent may be given another court, sec. 69, p. 479
effect of constitution conferring on new courts where jurisdiction of other courts already existing, sec. 69, p. 480
jurisdiction over offense charged may convict of lesser offense within, sec. 69, p. 480
effect of exceeding jurisdiction in fixing punishment, sec. 69, p. 481
same act may constitute offense against state and federal government and be punishable by courts of both, sec. 69, p. 481
appeal confers no jurisdiction where lower court had none, sec. 69, p. 481
how prosecutions for crime may be commenced, sec. 69, pp. 481, 482
not necessarily by indictment, sec. 69, p. 481
depends upon provisions of constitution, sec. 69, p. 481
when examination before magistrate provided for such examination necessary, sec. 69, p. 482
held if committed for one offense district attorney may file information for another, sec. 69, p. 482
but correctness of the rule doubted, sec. 69, p. 482
held also magistrate may commit for other offense than one charged, sec. 69, p. 482
where accused may elect in which court he will be tried his election gives exclusive jurisdiction, sec. 69, p. 483
demand for jury may deprive court of jurisdiction, when, sec. 69, p. 483
where jurisdiction depends upon whether offense "high and aggravated" indictment must charge the fact, sec. 69, p. 483

Cross-complaint—
when service of process necessary on filing, sec. 44, p. 324

D

Damages—
appearance to contest amount of after default not a waiver of defects in service, sec. 22, p. 106

Decree. (See JUDGMENT.)

De Facto Court. (See JUDGES.)
what is and when and how acts of may be attacked, sec. 28, p. 181; sec. 60, pp. 379–386
acts of not void, sec. 60, p. 383

Default. (See COMPLAINT; JUDGMENTS; JURISDICTION; PLEADINGS.)
judgment by, on complaint amended after service by publication, void, sec. 8, p. 22
appearance to set aside not a waiver of defects in service, sec. 22, p. 105
when question of jurisdiction may be raised on appeal, after, sec. 22, p. 113
when may be entered without notice, sec. 33, p. 212
when instrument provides for judgment without, sec. 33, p. 212
entered before expiration of time to answer effect of, sec. 38, pp. 280, 282, 283

Demurrer—
objection of want of jurisdiction when raised by, sec. 22, pp. 106, 107, 108, 109, 110, 116
is a statutory right in common law actions, sec. 22, p. 107
may go to jurisdiction of subject-matter or person, sec. 22, p. 110
when waives objection to jurisdiction, sec. 22, pp. 108, 110
when failure to demur waives objection to jurisdiction, sec. 22, pp. 109, 110
by demurring on other grounds, effect of, sec. 22, p. 110
filing demurrer a full appearance, sec. 22, p. 110
objection by must appear on face of record, sec. 22, p. 113
different rule in federal courts, sec. 22, pp. 113, 114

Deputy—
powers of general and special in service of process, sec. 37, pp. 253, 254
power of constables to appoint, sec. 37, p. 254
how return must be made by, sec. 39, pp. 293, 294

Discontinuance—
effect of on jurisdiction of court, sec. 24, p. 150

Discovery—
by interrogatories, sec. 18, p. 75
where law can compel, equity will not interfere, sec. 18, p. 79
what showing necessary to obtain, sec. 18, p. 80
equity taking jurisdiction to compel may grant relief, sec. 18, p. 80
a part of assistant jurisdiction of courts of equity, sec. 9, p. 27; sec. 18, p. 74
how far superseded and taken away by statutory remedies, sec. 9, p. 27; sec. 18, pp. 74–81

Discretion—
when court acts on without evidence notice not essential, sec. 33, p. 213
will not be controlled by mandamus, sec. 80, pp. 617, 618
subject to qualification, sec. 80, p. 618

District Attorney—
power of to prosecute by information, sec. 33, pp. 223, 224
District Court—
of United States maritime jurisdiction belongs to, sec. 5, p. 7
Divorce—
courts of equity exercise jurisdiction over, sec. 9, p. 24
constructive notice allowed in actions for, sec. 38, p. 270
power to grant to whom belongs, sec. 73, p. 504
is judicial power and belongs to courts, sec. 73, p. 504
special statute authorizing when unconstitutional, sec. 73, p. 504
formerly vested in ecclesiastical courts, sec. 73, p. 505
but now in supreme court, sec. 73, p. 505
in this country given to different courts, sec. 73, p. 505
how exercised in this country, sec. 73, p. 505
is wholly statutory, sec. 73, p. 505
grant of common law and equity jurisdiction does not confer, sec. 73, p. 505
cases holding that jurisdiction is equitable, sec. 73, p. 506
but not so as to granting of divorces, sec. 73, p. 506
matters connected with are, sec. 73, p. 506
action for civil action under codes, sec. 73, p. 506
and grant of jurisdiction in "civil cases both at law and in equity" confers, sec. 73, p. 506
what included in jurisdiction, sec. 73, p. 506
granting divorces,
allowance of alimony,
property rights,
custody and maintenance of children, sec. 73, p. 506
three latter incidental to granting divorce, sec. 73, p. 506
but not necessarily dependent upon it, sec. 73, p. 506
not so in all of the states, sec. 73, p. 506
to authorize disposition of property, issue as to must be raised by pleadings, sec. 73, p. 507
means of acquiring jurisdiction over divorce, and of incidental matters, different, sec. 73, p. 507
power to grant divorce affects *status* and is not personal action, sec. 73, p. 507
same as action *in rem*, although erroneously held to be action on contract, sec. 73, p. 507
personal service not necessary, sec. 73, p. 507
but otherwise as to alimony sec. 73, p. 507
for alimony can not be rendered against non-resident on constructive service, sec. 73, p. 507
but state may authorize against its own citizens, sec. 73, pp. 507, 508
law of domicil controls as to jurisdiction, sec. 73, p. 508
when and why decrees of respected in other states, sec. 73, p. 508
not universally respected, sec. 73, p. 509
some states hold decree on constructive service a nullity, sec. 73, p. 509
extent of power to grant in different states, sec. 73, pp. 509, 510
when held not to have extraterritorial effect, sec. 73, pp. 509, 510, 511
how far decree affects property out of state, sec. 73, p. 511
doctrine that decree binding as to one party and not the other anomalous, sec. 73, p. 512
decree for custody of children same as for divorce, as to validity, sec. 73, p. 512

Divorce—*Continued.*
only binding while children within state, sec. 73, p. 512
domicil of wife not domicil of husband for purposes of, sec. 73, p. 512
actual residence controls, sec. 73, p. 512
neither party resident of state decree void, sec. 73, p. 512
generally residence of plaintiff gives jurisdiction, sec. 73, pp. 512, 513
wife may acquire residence distinct from husband, sec. 73, p. 513
must be actual residence, sec. 73, p. 513
non-resident can not sue though defendant a resident, sec. 73, p. 513
residence must be *bona fide*, sec. 73, p. 514
what will constitute sufficient residence, sec. 73, p. 514
allegation and proof of necessary, sec. 73, p. 514
admission of party will not supply, sec. 73, p. 514
how jurisdictional facts must appear, sec. 73, p. 514
question of residence one of fact, sec. 73, p. 514
finding of *prima facie* evidence against collateral attack, sec. 73, p. 514
whether conclusive or not authorities not agreed, sec. 73, p. 515
decrees sometimes held to be final on ground of public policy, sec. 73, p. 515
on ground of public policy no appeal allowed in some states, sec. 73, p. 515
finding as to residence will not be inquired into collaterally, sec. 73, p. 515
decree rendered against non-resident on constructive notice may be attacked for fraud, sec. 73, p. 515
in some states residence not only test of jurisdiction, sec. 73, p. 516
place of commission of offense is one, sec. 73, p. 516
and parties must in some states have lived together within the state, sec. 73, p. 516
federal courts have no jurisdiction of within the states, sec. 73, p. 516
but may enforce decree of state court for alimony, sec. 73, p. 516
orders for alimony or for custody of children subject to modification, sec. 73, p. 516
even after final decree and after term, sec. 73, p. 516
petition for alimony, when no notice necessary, sec. 73, pp. 516, 517
power to grant or modify order for not suspended by appeal, sec. 73, p. 517
question of jurisdiction as affected by sufficiency of affidavit for publication, sec. 73, p. 517
presumed that sufficient affidavit made, when, sec. 73, p. 517
recitals in record presumed to be correct, sec. 73, p. 517
when affidavit can not be made until after return day of summons, sec. 73, p. 517
defective service waived by appearance, sec. 73, p. 518
what required in addition to publication, sec. 73, p. 518
personal service necessary against resident defendant, sec. 73, p. 518

Domestic Judgment. (See JUDGMENTS.)
when subject to collateral attack, sec. 22, pp. 121, 122; sec. 26, pp. 168, 169

Due Process of Law—
constitution of United States requires, sec. 33, p. 206
inhibition applies to state and state courts, sec. 33, p. 206
not confined to judicial proceedings, sec. 33, p 206.
apply to laws enacted by congress, sec. 33, p. 207
due process of law can not be defined, sec. 33, p. 207
meaning of, sec. 33, pp. 208, 212, 213
liberty, meaning of, sec. 33, p. 209

Due Process of Law—*Continued.*
constitution requires:
notice to party,
opportunity to be heard,
that hearing be before court or other lawful tribunal,
that hearing be according to law and established principles, sec. 33, p. 211
proceedings in court not always necessary, sec. 33, pp. 212, 213
eminent domain, personal notice not necessary, sec. 33, p. 213
decision according to discretion, without evidence, notice not necessary, sec. 33, p. 213
states may provide kind of notice necessary, sec. 33, p. 213
general notice to all persons, when sufficient, sec. 33, pp. 214, 221
personal service, when necessary, sec. 33, pp. 213–218
when constructive notice sufficient, sec. 33, p. 219
special appearance, effect of, sec. 33, p. 219
legislature can not authorize injunction, when, sec. 33, pp. 219, 220
may provide what amount of damages may be recovered, when, sec. 33, p. 220
notice not always necessary before action, sec. 33, p. 220
but action without notice can not be made conclusive, sec. 33, p. 220
police powers of states how far may be exercised, sec. 33, p. 221
denial of jury trial, when denial of due process of law, sec. 33, pp. 222–224
legislature can not deny right to resort to courts, sec. 33, p. 222
commitment of court not having jurisdiction, effect of, sec. 33, p 223
act of *de facto* court not void, sec. 33, p. 223
indictment, or presentment by grand jury, not essential, when, sec. 33, p. 223
trial after acquittal, effect of, sec. 33, p. 224
how far statutes may lawfully deprive citizens of their rights, sec. 33 p. 224

E

Eminent Domain—
taking property by, owner entitled to notice, sec. 33, p. 213

Equity. (See Courts; Equity Jurisdiction; Jurisdiction.)
courts of, in England, sec. 3, p. 3
consolidation of, in England, into supreme court of judicature, sec. 3, p. 3
in the United States, sec. 4, p. 5
but few equity courts in the states in this country, sec. 4, pp. 5–6
in federal practice equity and common law jurisdiction exercised by same court, sec. 4, p. 6
suits in consolidated in the "civil action" of the codes, sec. 8, p. 22; sec. 9, p. 26
but distinction between and common law action in matters of, substance remains, sec 8, p. 22; sec. 9, p. 23
distinction not so important as formerly, sec. 9, p. 23
distinction maintained in practice in federal and some of state courts, sec. 9, p. 23
difference between jurisdiction in and at common law mainly in remedies administered, sec. 9, p. 23
jurisdiction of courts of, preventive, sec. 9, p. 24
what gave rise to jurisdiction of courts of, sec. 9, p. 24
cases of equitable jurisdiction enumerated, sec. 9, p. 24
jurisdiction is ordinary and extraordinary, sec. 9, p. 25

Equity—*Continued.*
distinction between suits in and actions at law abolished by the codes, sec. 9, p. 26
jurisdiction in courts of, sometimes concurrent with courts of law, sec. 9, p. 27
actions that were cognizable in, made statutory, sec. 9, p. 27
courts of, may aid courts of law by injunction, sec. 17, pp. 71, 72
may restrain proceedings in court of law, when, sec. 17, p. 72
injunction must run against party, not court, sec. 17, p. 72
assistant jurisdiction of courts of, sec. 19, p. 81
how far assistant jurisdiction superseded and taken away by statutory remedies, sec. 18, pp. 74–81.
question of jurisdiction in courts of, how raised, sec. 22, pp. 107, 108

Equity Jurisdiction. (See Courts; Common Law Jurisdiction; Courts of Equity; Equity; Jurisdiction.)
often conferred by constitution or statute, sec. 10, p. 28
in aid of law courts by injunction, sec. 17, pp. 72, 73
how question of, raised, sec. 22, p. 107
intermingle by statute with common law constitutional and statutory, sec. 65, p. 420
has been modified by statute, sec. 65, pp. 420, 421
courts of general jurisdiction usually vested with, sec. 65, p. 421
how granted, sec. 65, p. 421
statutes have provided different modes of exercising, sec. 65, p. 422
as to question of jurisdiction, distinction between, and common law not so important as formerly, sec. 65, p. 422
given by constitution can not be taken away by statute, sec. 65, p. 424
in matters of probate and settlement of estates and guardianships, sec. 67, pp. 439–452
in divorce cases, sec. 73, pp. 504, 506
none in attachment, sec. 74, p. 519
ne exeat is, sec. 78, p. 581
injunction is, sec. 79, 588
extent of, pp. 79, sec. 589, 590
but has become largely statutory, sec. 79, p. 588
of federal courts can not be increased by state laws, sec. 79, p. 589
to enjoin proceedings in other courts, sec. 79, pp. 608–612
when will be exercised to grant new trials or vacate judgments, sec. 84, pp. 682–688

Evidence. (See Discovery; Perpetuation of Testimony; Witnesses.)
depositions, where may be taken, sec. 18, p. 75
production of documents may be compelled, and how, sec. 18, p. 75
how far rules of may be changed as against vested rights, sec. 33, p. 224

Exclusive Jurisdiction. (See Concurrent Jurisdiction; Jurisdiction.)
defined, sec. 9, p. 28, note 1
given to one court, no other court can exercise, sec. 17, p. 68
given by constitution to one court can not be conferred on another by legislature, sec. 17, p. 68; sec. 24, p. 146
otherwise where conferred by constitution, but not made exclusive, sec. 17, p. 68; sec. 24, p. 146
but legislature can not take away jurisdiction given by constitution, sec. 17, p. 68
constitutional, may be enlarged, but not diminished, sec. 17, p. 68
courts having concurrent, first assuming, has exclusive jurisdiction, sec. 17, p. 68

Exclusive Jurisdiction—*Continued.*
actions *in rem*, court first seizing property has, sec. 17, p. 72
but not where notice without seizure gives jurisdiction, sec. 17, p. 72
where new remedy provided to be pursued in particular court, jurisdiction exclusive, sec. 17, p. 72
admiralty exclusive in federal courts, sec. 17, p. 73
not confined to tide waters, sec. 17, p. 73

Execution—
proceedings supplementary to, sec. 18, p. 75
proceedings supplementary to, equity will not entertain jurisdiction over, where court of law has, sec. 18, p. 76
proceedings supplementary to, jurisdiction of equity over, obsolete, sec. 18, p. 78

Executive Department. (See GOVERNOR.)
how far acts of, may be controlled by courts, sec. 29, pp. 183, 196
executive acts, what are, sec. 29, pp. 186, 193
powers of, in matter of pardons, sec. 90, pp. 742–745

Executors. (See PROBATE JURISDICTION; SALES OF REAL ESTATE.)
question of legal appointment of, how raised in case of sale of real estate by, sec. 76, p. 556
whether in such case appointment of, can be collaterally attacked, sec. 76, pp. 556, 557
what is necessary to give court jurisdiction to order sale by, sec. 76, pp. 557, 558
petition is foundation of jurisdiction, sec. 76, p. 558
what petition must show, sec. 76, p. 558
order for sale an adjudication of all jurisdictional facts, sec. 76, p. 560
notice must be given, sec. 76, pp. 563–566
whether heir a necessary party, sec. 76, p. 564

Extradition. (See CRIMINAL JURISDICTION.)
whether proceedings legal or not does not affect jurisdiction to try for offense, sec. 69, p. 472
party extradited for one crime can not be tried for another, sec. 69, p. 472
federal courts may protect from, sec. 69, p. 472
how far proceeding for, may be inquired into by *habeas corpus*, sec. 82, pp. 643–647

F

Federal Courts—
principal federal courts, sec. 4, p. 6
maritime jurisdiction belongs to, sec. 5, p. 6
whether are inferior courts or not, sec. 7, p. 12; sec. 25, p. 162
are of limited but not of special jurisdiction, sec. 7, p. 14; sec. 25, p. 162
pleading must allege amount necessary to give jurisdiction, sec. 16, p. 62
amount pleaded not conclusive as to jurisdiction, sec. 16, p. 63
causes not cognizable in, may be remanded to state courts, sec. 22, p. 106
have concurrent jurisdiction with state courts, sec. 17, p. 73
dismissal of causes in, for want of jurisdiction, sec. 22, p. 106
question of jurisdiction how raised in, sec. 22, pp. 107, 116
presumptions in favor of jurisdiction of, sec. 25, p. 162
whether appearance in state court to remove to, gives jurisdiction, sec. 34, p. 226

Federal Courts—*Continued.*
equitable jurisdiction of, in the settlement of estates, sec, 67, pp. 450, 451
admiralty and maritime jurisdiction of, sec. 70, pp. 483–487
have no jurisdiction in divorce proceedings within the states, sec. 73, p. 516
equitable jurisdiction of, can not be increased by state laws, sec. 79, p. 589
power of, to enjoin proceedings in state courts, sec. 79, p. 609
jurisdiction of, in mandamus, sec. 80, p. 625
power of, under writ of prohibition, sec. 81, pp. 627–638
jurisdiction of, to issue writs of *habeas corpus*, sec. 82, pp. 649–655
jurisdiction of state courts to inquire into proceedings of, by *habeas corpus*, sec. 82, pp. 655–658
power of, to set aside judgments of state courts for fraud, sec. 84, p. 684

Findings—
of courts, effect of, as evidence of jurisdiction, sec. 23, pp. 126–145
as to what matters are conclusive, sec. 23, pp. 126, 127, 128, 129
difference between, and decision that court has jurisdiction, sec. 23, p. 126
distinction between domestic and foreign judgments as to effect of, sec. 23, pp. 124, 125, 127–145
of notice in probate proceedings, effect of, sec. 67, p. 460
of jurisdictional facts in proceedings for sale of real estate, sec. 76, pp. 560, 561

Foreclosure of Mortgage—
courts of equity have jurisdiction of, sec. 9, p. 24
on lands situate partly in different states, courts of either may foreclose as to all, sec. 15, p. 55

Foreign Judgment—
when subject to collateral attack, sec. 22, p. 121; see. 26, p. 169

Fraud—
a ground of equitable jurisdiction, sec. 9, p. 24
jurisdiction obtained by, will not be maintained, sec. 22, p. 117
setting up by answer that service procured by, not waiver of service, sec. 34, p. 232
decree of divorce, when may be set aside on ground of, sec. 73, p. 515

Fraudulent Conveyances—
action to set aside, courts of equity have jurisdiction of, sec. 9, p. 24
action to set aside, constructive notice allowed, sec. 38, p. 270

G

Garnishment—
principles affecting similar to attachment, sec. 75, p. 547
object of the proceeding, sec. 75, p. 547
differs from attachment in that seizure of property not necessary, sec. 75, pp. 547, 548
is ancillary to main action, sec. 75, p. 548
in what respect same as attachment as to what necessary to uphold it, sec. 75, p. 548
jurisdiction may rest upon garnishment proceedings, sec. 75, p. 548.
question of debt between garnishee and defendant treated as independent, sec. 75, p. 549

Garnishment—*Continued.*
as to affidavit general principles same as in attachment, sec. 75, p. 549
same as to bond, sec. 75, p. 549
who may object to sufficiency of bond, sec. 75, p. 549
as to necessity of notice in main action, sec. 75, p. 550
in lieu of seizure of property notice to garnishee required, sec. 75, p. 550
notice in nature of actual levy, sec. 75, p. 550
how garnishee bound by notice, sec. 75, p. 550
from time of notice property in custody of court, sec. 75, p. 550
may be in form of summons, sec. 75, p. 550
how doctrine of waiver of notice differs from rule in attachment, sec. 75, p. 550
garnishee not a party, and can not waive notice, sec. 75, pp. 550, 551
nor the making of affidavit, sec. 75, p. 551
may waive defects affecting himself, sec. 75, p. 551
how far defendant may waive notice or defects, sec. 75, p. 551
nothing peculiar about proof of service, sec. 75, p. 551
jurisdiction as to amount what controls, sec. 75, p. 551
where proceeding must be brought, sec. 75, pp. 551, 552
against foreign corporations, sec. 75, pp. 551, 552
non-resident garnishee not subject to constructive notice, sec. 75, p. 552
non-residence of defendant immaterial if property found in hands of garnishee, sec. 75, p. 552
must be property within jurisdiction subject to execution, sec. 75, p. 552
on what cause of action garnishment will lie, sec. 75, p. 553
how far garnishee interested in question of jurisdiction, sec. 75, p. 553
how far may question judgment in main action, sec. 75, p. 553

Governor. (See CONSTITUTIONAL LIMITATIONS.)
how far acts of in proceedings for return of fugitives from justice may be inquired into by *habeas corpus*, sec. 82, pp. 643–645
power of in matter of pardon, sec. 90, pp. 742–745. (See PARDONS.)

Grand Jury—
impaneled by court not having jurisdiction, action of void, sec. 33, p. 223
indictment by not essential to due proces of law, sec. 33, pp. 223, 224

Guardian—
appearance may be made by, sec. 34, p. 225
but not without service on ward, sec. 34, p. 234
cases to the contrary, sec. 34, p. 234
power of, to waive service of process on ward, sec. 41, pp. 300, 301
ad litem, effect of appointment and appearance of, without service on minor, sec. 41, pp. 301, 302
deed of, what necessary to uphold, sec. 76, p. 555
question of legality of appointment of, how raised in case of sale of real estate by, sec. 76, p. 556
whether in such case appointment can be collaterally attacked, sec. 76, p. 557
what necessary to give court jurisdiction to order sale of real estate by, sec. 76, pp. 557, 558
petition is foundation of jurisdiction, sec. 76, p. 558
what petition must show, sec. 76, pp. 558, 561
notice must be given, sec. 76, p. 563
whether ward a necessary party, sec. 76, p. 564

Guardian ad litem. (See GUARDIAN.)
effect of appointment and appearance by, without service on minor, sec. 41, pp. 301, 302
failure to appoint where has been service, effect of, sec. 41, p. 302
failure to appoint in proceedings for sale of real estate, effect of, sec. 76, p. 566

H

Habeas Corpus—
question of jurisdiction may be raised by, sec. 22, p. 112
object of the writ, sec. 82, pp. 638, 639
right to, exists independently of, and can not be taken away by, statute, sec. 82, p. 639
power to issue, generally given to all superior courts, state and national, sec. 82, p. 639
appeal generally allowed in cases of, sec. 82, p. 639
if not, *certiorari* lies, sec. 82, p. 639
ground of doctrine in some states that can be no appeal, sec. 82, p. 639
causes for, not generally provided by statute, sec. 82, pp. 639, 640
general principles upon which was issued by courts in England control courts of this country, sec. 82, p. 640
causes for, have been increased and powers of courts extended, sec. 82, p. 640
can issue against judicial officers only to test jurisdiction, sec. 82, p. 640
to what extent jurisdiction may be inquired into, sec. 82, pp. 640–643
excessive or unwarranted sentence imposed, when ground for the writ, sec. 82, pp. 641–643
sufficiency of indictment, when may be inquired into, sec. 82, p. 643
surrender of fugitive from justice, how far proceedings for, may be tested by, sec. 82, pp. 643–645
when writ will lie to test sufficiency of evidence, sec. 82, p. 645
judgment of competent court, sufficiency of, will not be inquired into, sec. 82, pp. 646, 647
when question whether law under which court acted was constitutional may be determined by, sec. 82, pp. 646, 647
and where statute repealed, sec. 82, pp. 646, 647
petitioner may be discharged before or after final judgment, sec. 82, p. 647
judgment out of term time void and writ will issue, sec. 82, p. 647
must be actual imprisonment, sec. 82, p. 648
writ confined to question of release or recommitment, sec. 82, p. 648
can not determine property rights, sec. 82, p. 648
is a writ of right, sec. 82, p. 648
but courts have discretion as to issuance of, sec. 82, p. 648
applies where one not speedily brought to trial, sec. 82, p. 648
effect of failure to bring to trial, sec. 82, pp. 648, 649
when question of legality of confinement must be determined from the record, sec. 82, p. 649
extent of jurisdiction of federal courts over, sec. 82, pp. 649–658
power of state courts over proceeding in federal courts, sec. 82, pp. 654–658
and of imprisonment by federal officers, sec. 82, p. 656
generally held denial of writ no bar to another application, sec. 82, p. 658
but order discharging bars further prosecution, when, sec. 82, p. 658
territorial jurisdiction of courts in cases of, sec. 82, p. 658

Habeas Corpus—*Continued.*
may issue from one judge and be returnable to another, sec. 82, p. 658
change of venue, application for, when ground for the writ, sec. 82, pp. 658, 659

I

Impeachment, sec. 71
jurisdiction of, usually vested in political body, sec. 71, p. 487
of federal officer in whom power vested, sec. 71, p. 487
senate acquires jurisdiction, how, sec. 71, p. 487
impeachment of officer does not affect jurisdiction of courts to try him for same offense, sec. 71, p. 487
jurisdiction of impeachment of state officers, sec. 71, p. 488

Imprisonment for Debt—
by *ne exeat* not a violation of constitutional provision against, sec. 78, p. 583

Incidental powers. (See Inherent Powers.)

Indictment—
found by grand jury impaneled by court not having jurisdiction, void, sec. 33, p. 223
not essential to due process of law, sec. 33, pp. 223, 224
must allege that crime was committed within jurisdiction of court, sec. 69, p. 473
if not, subject to demurrer, sec. 69, p. 474
or motion to quash, sec. 69, p. 474
or motion in arrest of judgment, sec. 69, p. 474
jurisdiction determined by, and not by verdict, when, sec. 69, p. 480
when sufficiency of, may be inquired into by *habeas corpus*, sec. 82, p. 643

Inferior Courts. (See Courts; Jurisdiction.)
what are, sec. 6, p. 7; sec. 7, p. 10
distinction between, and courts of general jurisdiction, sec. 7, p. 10
difference between courts of *limited* and of special jurisdiction, sec. 7, p. 14
limitation by constitution of power to create, effect of, sec. 24, p. 147
may punish for contempt, sec. 27, p. 181
power of, to punish for contempt, sec. 72, p. 499
whether have power to grant new trials and vacate judgments, sec. 84, p. 671

Inferior Jurisdiction. (See Special Jurisdiction.)

Inherent Powers—
of courts to set aside their judgments, sec. 22, p. 121
generally, sec. 27
enumerated, sec. 27, p. 170
sometimes treated of as incidental powers, sec. 27, p. 171
necessary to transaction of business of courts, sec. 27, p. 173
can not be taken away by legislature, sec. 27, p. 174
but may be limited and controlled, sec 27, p. 174
to punish for contempt, sec. 27, p. 175
to enact rules, sec. 27, p. 177
to grant new trials, sec. 27, p. 180; sec. 84, p. 671
of inferior courts, sec. 27, pp. 180, 181
to amend records, sec. 27, p. 181
to disbar and otherwise punish attorneys, sec. 31, pp. 198–201
in contempt proceedings generally, sec. 72, pp. 488–504 (see Contempts)

Injunctions—
courts of equity have jurisdiction of, sec. 9, p. 24
may issue in aid of proceedings in law court, sec. 17, pp. 71, 72
to prevent proceeding at law when, sec. 17, p. 72
must run against party, not court, sec. 17, p. 72
when enforcement of judgment will be prevented by, sec. 22, p. 114
legislature can not authorize when, sec. 33, pp. 219, 220
is an equitable remedy, sec. 79, p. 588
but has become statutory, sec. 79, p. 588
remains much the same as it was under equity practice, sec. 79, p. 588
combination of common law and equity under codes has not changed, sec. 79, p. 589
jurisdiction of appellate courts over, sec. 79, p. 589
statutes have extended jurisdiction in affording, sec. 79, p. 589
of federal courts can not be increased by state laws, sec. 79, p. 589
particular classes of cases considered, sec. 79, pp. 589, 590
grounds upon which relief will be granted, sec. 79, p. 590
can not be had where an adequate remedy at law, sec. 79, p. 591
and want of must be affirmatively shown, sec. 79, p. 591
what will amount to adequate remedy at law, sec. 79, pp. 591–594
solvency of defendant when material, sec. 79, p. 592
extraordinary remedy at law will defeat right, sec. 79, p. 593
against whom may issue, sec. 79, p. 594
granting of, rests in discretion of court, sec. 79, p. 594
power usually confined to courts of original jurisdiction, sec. 79, p. 594
how far may be exercised by appellate courts, sec. 79, pp. 594–600
right to, lost by failure to ask in time, sec. 79, p. 600
when courts may enjoin collection of taxes, sec. 79, pp. 600–606
power to enjoin issuance and sale of municipal bonds, sec. 79, pp. 606–608
power to enjoin judicial proceedings and when will be exercised, sec. 79, pp. 608–612
power to restrain acts of subordinate tribunals or officers, sec. 79, pp. 612, 613
courts can not control action by independent department of government, by, sec. 79, p. 613
can not be used to determine title to office, sec. 79, p. 613
no jurisdiction in criminal cases, not affecting property, sec. 79, p. 614
temporary, may be granted without notice, sec. 79, p. 614
but only until notice given, sec. 79, p. 614
notice may be waived, sec. 79, p. 614

Interest—
plaintiff may bring amount within jurisdiction by failing to claim, sec. 16, p. 62
excluded in fixing jurisdiction as to amount, sec. 16, p. 60
interest on amount of verdict, effect on appellate jurisdiction as to amount, sec. 16, p. 65
same, interest on judgment, sec. 16, p. 65

Interpleader—
within jurisdiction of courts of equity, sec. 9, p. 24

Issue—
raising, not within jurisdiction of court, effect of, sec. 24, p. 153

J

Judges—
de facto, what is, sec. 28, p. 181
assuming to act as, of a court not existing, acts void, sec. 28, pp. 181, 182
must hold under color of office to be *de facto*, sec. 28, p. 182
attorneys, when may act as, sec. 28, p. 182
can not be required to perform ministerial duties, sec. 29, p. 194
disqualified, application for change from, unnecessary, sec. 47, p. 335
knowledge of, what may aid defective affidavit for change, sec. 47, p. 341
defined, sec. 53, p. 354
all officers performing judicial functions considered here, sec. 53, p. 354
what officers acting judicially not, sec. 53, p. 354
what officers are, sec. 53, p. 355
power of legislature to confer and take away jurisdiction, sec. 54
powers, may be constitutional or by virtue of statute, sec. 54, p. 355
if constitutional, legislature can not limit or control, sec. 54, p. 355
can not be given to commission, sec. 54, pp. 355, 356
legislature can not vest non-judicial officers with judicial powers, sec. 54, p. 356
nor can such powers be conferred by consent, sec. 54, p. 356
same officer may perform judicial and other functions, sec. 54, p. 356
but power to confer judicial and other powers on same officers depends on constitution, sec. 54, p. 356
different departments of government separated by constitutions, sec. 54, p. 356
under such constitutions judicial powers can not be given to executive or legislative officers, sec. 54, p. 356
same where constitution vests all judicial power in courts, sec. 54, pp. 356, 357
what acts not within constitutional inhibition, sec. 54, p. 357
effect of constitutional provision on existing statutes vesting jurisdiction in officers not named therein, sec. 54, p. 357
power vested in *courts* by constitution can not be vested in *judges* by statute, sec. 54, pp. 357, 358
when question whether judicial or not may be determined from legislative act, sec 54, p. 358
judge may have jurisdiction over matters of which his court has none, sec. 54, p. 358
contempt, power of non-judicial officer to punish for, sec. 54, p. 359
when judge can not be deprived of office by statute, sec. 54, p. 360
special judges, power of legislature to provide for, sec. 54, p. 360
power of legislature to impose other than judicial duties on judges, sec. 55
judges can not be compelled to perform non-judicial duties, sec. 55, p. 361
but may perform ministerial functions, sec. 55, p. 362
nature of act not changed because performed by a judge, sec. 55, p. 362
can not perform other than judicial duties under some constitutions, sec. 55, p. 362
inhibition applies to state and not to municipal governments, sec. 55, p. 362
different powers often conferred on inferior tribunals and officers, sec. 55, p. 363

Judges—*Continued.*
when judge may perform ministerial duties, sec. 55, p. 364
attempt to perform duties belonging to other department, acts void, sec. 55, p. 364
an act of legislature attempting to authorize such performance unconstitutional, sec. 55, pp. 364, 365
general powers and duties of judges, sec. 56
are judicial, sec. 56, p. 365
certain of must be performed by court, others by judges at chambers, sec. 56, p. 365
can not be delegated to others, sec. 56, p. 365
if imposed by constitution, can not be relieved of by statute, sec. 56, p. 365
usually, but not always, cease with termination of office, sec. 56, p. 365
what acts may be done after term of office expires, sec. 56, p. 365
powers confined to territorial limits, sec. 56, p. 366
exceptions to this rule, sec. 56, p. 366
power to appoint officers and employees, sec. 56, p. 366
can not fix salary of court reporter, sec. 56, p. 366
power to act in another district, sec. 57
generally limited to county or district over which court has jurisdiction, sec. 57, p. 366
but power to act elsewhere may be given by statute, when, sec. 57, p. 366
provision for frequently made, sec. 57, p. 366
held, that as state officers, may act in other districts without statutory authority, sec. 57, p. 367
but better rule the other way, sec. 57, p. 367
in some states provided for by constitution, sec. 57, p. 367
authority of federal judges in other districts, sec. 57, pp. 367, 368
when statutes authorizing judge to act in other county or district, valid, sec. 57, p. 369
where act must be done by court can not be done out of the territory where action pending, sec. 57, p. 370
exceptions to rule, sec. 57, p. 370
two judges can not act at same time for same court, when, sec. 57, p. 370
when special and regular terms may be held at same time, sec. 57, p. 370
presumptions in favor of acts of judge from another district, sec. 57, p. 371
law providing for calling in non-resident judge must be complied with, sec. 57, p. 371
power to "hold court," what included in, sec. 57, p. 371.
power of legislature to authorize under constitution giving such power, sec. 57, p. 371
performs all the duties of resident judge, when, sec. 57, p. 371
powers of resident judge suspended, sec. 57, pp. 371, 372
by whom bill of exceptions settled, sec. 57, p. 372
where may be settled and signed, sec. 57, p. 372
can not act out of state, sec. 57, p. 372
authority at chambers, sec. 58
acts by courts must be done in term time, sec. 58, p. 372
exceptions by statute, sec. 58, pp. 372, 373
such statutes exceptional and rare, sec. 58, p. 373
acts that may be done at chambers usually provided by statute, sec. 58, p. 373

Judges—*Continued.*
and in some cases held must be, sec. 58, p. 373
incidental to jurisdiction of the court, sec. 58, p. 373
and can be exercised only over matters of which court has jurisdiction, sec. 58, p. 373
powers given to court by constitution can not be vested in judge, by statute, sec. 58, p. 374
power established by long usage, sec. 58, p. 375
existed at common law, sec. 58, p. 375
and included in general grant of jurisdiction to court, sec. 58, p. 375
but usage not applicable to special powers granted by statute, sec. 58, p. 375
held power to "hold court" in another district does not authorize to act at chambers, sec. 58, p. 375
but usually judge called in has all powers of resident judge, sec. 58, pp. 375, 376
powers at chambers, as usually granted, enumerated, sec. 58, p. 376
can not issue injunction to operate beyond jurisdiction of court, sec. 58, p. 376
power independent of terms of court, sec. 58, p. 376
authority in vacation, sec. 59
can not perform functions of court in vacation, sec. 59, p. 377
unless expressly authorized by statute and not forbidden by constitution, sec. 59, p. 377
entry of judgment ministerial act, and may be performed in vacation, sec. 59, p. 377
court may be, by law, always in session for urgent business, sec. 59, p. 377
when "court" and "judge" are synonymous in granting power, sec. 59, p. 377
acts in vacation, when judicial acts of the court, sec. 59, p. 377
orders that may be made at chambers may be made in vacation, as a rule, sec. 59, p. 378
de jure and de facto judges, sec. 60
who is a *de facto* officer, sec. 60, pp. 379–383
color of title, when must be shown, sec. 60, pp. 380, 381
and reputation of being an officer, sec. 60, p. 381
mere exercise of duties of office not enough, sec. 60, p. 382
must assume to act as judge, sec. 60, p. 382
attorney appointed to act as special, not *de facto* judge, sec. 60, p. 382
exception when irregularly appointed where appointment authorized, sec. 60, p. 382
can be no judge *de jure* or *de facto* if no court, sec. 60, p. 382
acts of *de facto* judge not invalid, sec. 33, p. 223; sec. 60, p. 383
nor subject to collateral attack, sec. 60, p. 383
but whether *de facto* judge or mere intruder may be questioned collaterally, sec. 60, p. 383
question of right to office must be raised by direct action for that purpose, sec. 60, p. 383
nature of such action, sec. 60, p. 383
mistake as to termination of office, action in good faith, effect of, sec. 60, pp. 383, 384
failure to comply with condition subsequent to election, as to give bond, effect of, sec. 60, p. 384
is rightful officer until right forfeited by direct action, sec. 60, p. 384

Judges—*Continued.*
appointment under unconstitutional statute, effect of, sec. 60, p. 384
may be both *de jure* and *de facto* judge at same time, sec. 60, p. 385
but not two of either, sec. 60, p. 385
nor can a *de facto* and *de jure* judge be in actual possession of, or exercising duties, of office at same time, sec. 60, p. 386
rule that upholds acts of *de facto* judge extends to all his duties, sec. 60, p. 386
special judges, sec. 61
who are, sec. 61, p. 387
power to appoint attorneys to act as, sec. 61, pp. 387, 388
how judge of another county or district may be called to act as, sec. 61, pp. 388, 389
when cause for, must appear on face of record, sec. 61, p. 389
authority will be presumed, when, sec. 61, p. 389
recital in record showing necessary facts, effect of, sec. 61, p. 390
regular judge can not excuse himself and appoint special, when, sec. 61, p. 390
when and how objection to appointment may be made, sec. 61, p. 390
when objection obviated by new appointment, sec. 61, p. 391
same presumptions apply to proceedings of, as to regular judges, sec. 61, p. 391
record showing regular appointment, when conclusive, sec. 61, p. 391
attorney acting by consent only, acts of, void, sec. 61, p. 391
when appointment not in writing, will be held insufficient, sec. 61, p. 391
effect of failure to appoint in writing on acts of, sec. 61, p. 391
are voidable only and not void, sec. 61, p. 391
failure to take oath of office, effect of, sec. 61, p. 392
prohibition, when will lie to prevent action by, sec. 61, p. 392
failure to appear and act, effect of, sec. 61, p. 392
extent of powers of attorney appointed as, controlled by statute, sec. 61, pp. 392, 393
when given all powers of regular judge, may sign bill of exceptions after term of appointment, sec. 61, p. 393
powers of judge called from another district limited by constitution and statutes, sec. 61, p. 393
may follow cause if transferred to another county, sec. 61, pp. 393, 394
special, can not appoint another judge, sec. 61, p. 394
can not hold court while regular judge is sitting, sec. 61, p. 394
to try particular cause, may retry same if reversed on appeal, sec. 61, p. 394
appointed for disqualification of regular judge, may continue after another judge not disqualified takes the bench, sec. 61, pp. 394, 395
to try particular cause, what includes, sec. 61, p. 395
special judge who refuses may be compelled to act, sec. 61, p. 395
judges disqualified by interest or otherwise, sec. 62
may be wholly disqualified by, sec. 62, p. 395
disqualification can not be removed by consent, sec. 62, p. 395
what interest will disqualify, sec. 62, pp. 395–400
general interest as tax-payer, effect of, sec. 62, pp. 396, 397
bias or prejudice of judge, effect of, sec. 62, p. 398

Judges—*Continued.*
compared with the interest that will disqualify a juror, sec. 62, p. 399
circumstances that will disqualify enumerated, sec. 62, p. 400
pecuniary interest in result, having been of counsel, consanguinity or affinity, bias or prejudice, sec. 62, p. 400
forbidden by law to act, his acts void, sec. 62, pp. 401, 402
and should be so if disqualified by interest, whether forbidden to act or not, sec. 62, p. 402
and whether objection is made by parties or not, sec. 62, pp. 402–408
held otherwise in some cases, sec. 62, p. 403
effect where one of several judges disqualified, sec. 62, p. 408
where transfer to another county is authorized on account of, judge must pass upon question of disqualification, sec. 62, p. 408
and if exists, must order transfer, sec. 62, p. 408
to what extent not disqualified to act, sec. 62, p. 409
where failure to act will deprive parties of all remedy, sec. 62, p. 409
if persists in acting, how may be prevented, sec. 62, p. 410
when refuses to act, when not disqualified, how may be compelled to act, sec. 62, p. 411
not disqualified in appellate court because of having acted in lower court, sec. 62, p. 411
disqualified to hold the office, effect of, sec. 62, p. 412
bias and prejudice of the judge as affecting jurisdiction, sec. 63
is usually made ground for change of venue, sec. 63, p. 412
but not in some of the states, sec. 63, p. 412
may arise from causes which disqualify, sec. 63, p. 413
but is extended to causes not involving personal interest, sec. 63, p. 413
but as to the latter may be waived by parties, sec. 63, p. 414
and if objection not made in time proceedings not void, sec. 63, p. 414
liability of judge acting without jurisdiction, sec. 64
wholly without jurisdiction, liable as trespasser, sec. 64, p. 414
but if has jurisdiction of subject-matter and person, not liable for acts in excess of jurisdiction, sec. 64, p. 414
not liable for error of judgment, sec. 64, p. 414
even where result of lack of care or prudence, sec. 64, p. 414
or where done maliciously, sec. 64, p. 414
test of liability is that which distinguishes void from voidable or erroneous judgments or proceedings, sec. 64, p. 415
immunity where act is malicious does not extend to *quasi* judicial officers, sec. 64, p. 415
and judge liable for conspiracy with others to prosecute through his court, sec. 64, p. 415
when must determine in advance whether has power to act, effect of erroneous decision, sec. 64, p. 416
when justice of the peace liable for issuing warrant for act not constituting public offense, sec. 64, p. 417
protection extends only to judicial acts, sec. 64, p. 417
in some cases confined to judges of superior courts, sec. 64, p. 417
but this distinction not warranted, sec. 64, pp. 417, 418
enough if judge has jurisdiction of general subject-matter, sec. 64, p. 418
exemption from liability is for the public good, sec. 64, pp. 418, 119

Judges—*Continued.*
judge deprived of jurisdiction by change of venue, liable if proceeds further, sec. 64, p. 419
when action by, will be compelled by mandamus, sec. 80, pp. 620, 622

Judgments. (See Courts; Jurisdiction.)
may be both erroneous and void, sec. 8, p. 17
judgment may be void for want of jurisdiction, although court has jurisdiction of subject-matter and of person, sec. 8, p. 17
erroneous, can only be attacked directly, sec. 8, pp. 17, 18
court must have power to render particular judgment or void for want of jurisdiction, sec. 8, p. 17
power to render is jurisdiction, sec. 8, p. 19
taken on complaint, amended after service by publication, void, sec. 8, p. 22
without pleadings or other statement of parties, void, sec. 8, p. 23
foreign and domestic, distinctions between, as to recitals in record, sec. 13, p. 41
decree *in rem*, only persons notified affected by, sec. 14, pp. 49, 50
right to set aside final, not incidental to courts of inferior jurisdiction, must be expressly authorized, sec. 20, p. 93
where power to set aside is given, mode prescribed must be followed, sec. 20, p. 93
equity will not enjoin enforcement of, because irregular or void, sec. 22, p. 114
but must be inequitable, sec. 22, p. 115
right to vacate void judgments inherent in courts, sec. 22, p. 115
must be vacated or changed during term, when, sec. 22, p. 115
void on face, may be set aside, sec. 22, p. 121
such relief may be obtained by motion, sec. 22, p. 121
but better rule is that action is necessary after term in which was rendered, sec. 22, p. 121
but court is not bound after term to enforce, when void, sec. 22, p. 121
can not be rendered on Sunday, sec. 19, p. 83
can not be rendered in vacation, sec. 19, pp. 84, 85
rendered in vacation not validated by consent of parties, sec. 19, p. 85
rendered during term may be entered in vacation, when, sec. 19, p. 86
motion to vacate, when question of jurisdiction raised by, sec. 22, p. 111
jurisdiction may be questioned by action to set aside, sec. 22, p. 111
effect of recitals in, as evidence of jurisdiction, sec. 23, pp. 126–145; sec. 25, pp. 163–165
not rendered within time limited, effect of, sec. 24, pp. 148, 149
distinction between rendition and entry of, sec. 24, p. 149
appeal or writ of error, effect of, on, sec. 24, p. 150
bond to stay proceedings, when necessary to suspend operation of, sec. 24, p. 150
effect of stay bond on, sec. 24, pp. 150, 151
rendition of one of two authorized, alternative, exhausts jurisdiction of court, sec. 24, p. 155
presumptions in favor of, secs. 25, 26
of courts of special jurisdiction, sec. 25, p. 156
of court of general exercising special jurisdiction, sec. 25, pp. 156, 157
where court proceeds according to statute, and not the common law, sec. 25, pp. 158–161

Judgments—*Continued.*
of domestic courts, sec. 25, pp. 162, 163
of foreign courts, sec. 25, p. 163
of federal courts, sec. 25, p. 162
where the attack is direct, sec. 25, p. 165
entry of, when conclusive as to jurisdiction, sec. 25, p. 165
by default, presumptions as to, sec. 25, pp. 167, 168
without jurisdiction, void, sec. 26, p. 168
exception where shows jurisdiction on its face, sec. 26, p. 168
or where jurisdiction will be presumed, sec. 26, p. 169
recitals in record, when conclusive, sec. 26, p. 169
effect of void judgment, sec. 26, p. 169
void, court of equity will not set aside, sec. 26, p. 170
personal, can not be rendered on constructive service, sec. 38, pp. 267, 268
personal, defined, sec. 38, p. 268
when void for want of sufficient affidavit for constructive notice, sec. 38, pp. 271–279
when invalid because of interest of judge as former attorney for one of parties, sec. 47, pp. 337, 338
entry of, not a judicial act, sec. 59, p. 377
in contempt proceedings, whether final or not, sec. 72, pp. 493, 494
in case of contempt, when void, sec. 72, p. 494
effect of, and credit given to, in divorce cases, sec. 73, pp. 508–513
what may be, in attachment, sec. 74, p. 539
when courts of equity will vacate or enjoin enforcement of, sec. 79, pp. 608–612
how far validity of, may be inquired into by *habeas corpus*, sec. 82, pp. 638–659
how and for what causes reviewed by *certiorari*, sec. 86, pp. 698–722
or by bill or writ of review, sec. 87, pp. 722–727
and by appeal, sec. 88, pp. 727–737
jurisdiction in naturalization proceedings, sec. 89, pp. 737, 742. (See NATURALIZATION.)
new trials and vacation of,
by what means party may be relieved from erroneous or void judgment, sec. 84, pp. 670, 671
audita querela almost obsolete but exists in some states, sec. 84, p. 671
its objects, sec. 84, p. 671
power to grant new trials inherent, sec. 84, p. 671
and can not be taken away by statute, sec. 84, p. 671
whether inferior courts possess, sec. 84, pp. 671, 672
distinction made between power to vacate and modify, and to grant new trials, sec. 84, p. 672
inherent powers may be limited and controlled, and this has been done, sec. 84, pp. 672, 673
statutes provide the time when and means by which relief may be had, sec. 84, p. 673
statute not grants of but limitations upon the power, sec. 84, p. 673
extent and object of the inherent power to give relief, sec. 84, p. 673
for mere errors, within legislative control, sec. 84, p. 673
courts have control over their judgments until end of term, sec. 84, pp. 673, 674
and may, within the term, vacate or modify its judgments or grant new trials, sec. 84, p. 674

Judgments—*Continued.*
after term judgments final and power over ceases, sec. 84, p. 674
and can only be regained by new proceedings, sec. 84, p. 674
what necessary to give jurisdiction of new proceeding, sec. 84, p. 674
notice, how served, sec. 84, p. 674
may be waived, sec. 84, p. 674
requirement that judgment must be vacated during term, may be waived, sec. 84, p. 674
when proceeding for new trial under statutes must be commenced, sec. 84, pp. 675, 676, 678
if court acts after time limited proceedings void, sec. 84, p. 676
some cases to the contrary, sec. 84, p. 676
time can not be extended unless authorized by statute, sec. 84, p. 676
except by consent of parties, sec. 84, p. 676
party may be relieved from a failure to act in time in case of fraud or mistake, sec. 84, pp. 676, 677
statutory exceptions to rule that proceedings must be commenced within certain time, sec. 84, pp. 676, 677
exceptions independently of statute, sec. 84, p. 677
statute limiting time how far binding on the courts, sec. 84, pp. 677, 678
judgment may, by statute, be made final before end of term, sec. 84, p. 679
appeal does not deprive court of power over judgment during term, sec. 84, p. 680
statutes are limitations of *groumds* for new trial and vacation of judgment, as well as to *time*, sec. 84, pp. 680, 681
limitations apply only to erroneous and not to void judgments, sec. 84, p. 681
latter open to attack at any time, sec. 84, p. 681
but not necessarily where invalidity does not appear on face of record, sec. 84, p. 681
right to new trial confined to grounds specified in statute, sec. 84, p. 682
and made the basis of the motion, sec. 84, p. 682
courts of equity may grant new trials and vacate judgments of other courts, sec. 84, pp. 682, 683
how far and for what causes such power will be exercised, sec. 84, pp. 682, 683
how far one court may vacate or set aside proceedings of court of concurrent jurisdiction, sec. 84, pp. 683, 684
can not upon mere motion, sec. 84, p. 683
but may by independent action, sec. 84, p. 683
not however, while action is still pending in the other court, sec. 84, p. 683
an adequate remedy by motion in court rendering judgment, other court will not interfere, sec. 84, p. 683
but refusal does not rest on want of jurisdiction, sec. 84, pp. 683, 684
federal courts, power of, to set aside proceedings of state courts, sec. 84, p. 684
statutes authorizing vacation or review do not take away general equity jurisdiction to vacate and annul, sec. 84, p. 684
power does not extend to correction of errors, sec. 84, p. 685
courts of chancery proceed on equitable grounds, sec. 84, p. 685

Judgments—*Continued.*
will not vacate because void unless inequitable, sec. 84, p. 685
what character of fraud will authorize vacation of judgment, sec. 84, pp. 685, 688
must be extrinsic or collateral to the matter determined by the court, sec. 84, p. 685
fact that judgment procured by perjury or false evidence will not authorize, sec. 84, pp. 686, 687
different rule in some states, sec. 84, p. 687
court of equity will not interfere if other adequate remedy, sec. 84, p. 688
proceeding to vacate can not retry questions of law or fact, sec. 84, p. 688
appropriate remedy in court of equity by bill of review, sec. 84, p. 688
remedy abolished in some states, sec. 84, p. 688
but original action of like nature may be prosecuted, sec. 84, p. 688
new trial may be granted of part of issues, sec. 84, p. 688
but not as to finding of part of facts, sec. 84, p. 688
proceeding to vacate by court rendering, usually by motion, sec. 84, p. 689
when relief can not be obtained by action in another court, sec. 84, p. 689
when only by independent action, sec. 84, pp. 689, 690
for relief on account of errors, remedy is by motion for new trial in court rendering judgment, sec. 84, p. 690
writ of *coram nobis*, what is and objects of, sec. 84, p. 690
and writ of *recordari*, sec. 84, p. 690
remedy by motion held a direct attack, sec. 84, p. 690
after final determination of action, to what remedy by motion confined, sec. 84, p. 690
when independent action necessary, sec. 84, p. 690
order vacating not generally reviewable by court making it, sec. 84, pp. 690, 691
but may be set aside during term, sec. 84, p. 691
to what court and where motion for new trial must be made, sec. 84, p. 691
action to annul where must be brought, sec. 84, p. 691
in federal courts decision on not subject to review, sec. 84, p. 691
how far motion for is addressed to discretion of court, sec. 84, p. 691
exception to ruling on, how taken, sec. 84, p. 691
new trial as of right, when allowed, sec. 84, p. 692
whether new trial can be had after entry of judgment, sec. 84, p. 692
when affirmance on appeal not a bar to motion, sec. 84, p. 692

Judicature Act—
vests legal and equitable jurisdiction in same court in England, sec. 9, p. 25

Judicial Department. (See COURTS; JUDGES.)
powers and duties of, sec. 29, pp. 183–196
how far, may control acts of officers in other departments, sec. 29, pp. 183–196

Judicial notice—
of what will be taken, sec. 12, p. 32

Jurisdiction. (See Actions; Admiralty and Maritime Jurisdiction; Appeals; Appearance; Appellate Jurisdiction; Assistant Jurisdiction; Attachment; Arbitration; Bills and Writs of Review; Certiorari; Change of Venue; Concurrent Jurisdiction; Constitutional Jurisdiction; Contempts; Courts; Criminal Jurisdiction; Divorce; Due Process of Law; Equity Jurisdiction; Exclusive Jurisdiction; Garnishment; Habeas Corpus; Homesteads; Inherent Powers; Injunctions; Judges; Judgments; Jurisdiction as to Amount; Jurisdiction of Person; Mandamus; Means of Acquiring; Naturalization; Ne Exeat and Arrest and Bail; New Trials and Vacation of Judgments; Original Jurisdiction; Presumptions; Probate Jurisdiction; Process; Prohibition; Quo Warranto; Sales of Real Estate; Service of Process; Special Jurisdiction; Subject-matter; Summary Jurisdiction; Terms of Court; Territorial Jurisdiction; Venue; Waiver; Writs of Error.)

of particular courts,
of courts of superior and general jurisdiction, sec. 2, p. 2
of courts of special and inferior jurisdiction, sec. 2, p. 2
federal courts exercise both common law and equity, sec. 4, p. 6
of military and maritime courts, sec. 5, p. 6
federal have only limited, sec. 7, p. 14
courts of record have common law, sec. 9, p. 28

defined, sec. 8, pp. 16–23
limited and special distinguished, sec. 7, p. 14
difference between void and erroneous acts, sec. 8, p. 17
must have power to render particular judgment given, sec. 8, p. 19
of subject-matter, what is, sec. 8, p. 19
is it necessary that point decided be within issues? sec. 8, pp. 20, 21
authority to hear and determine is jurisdiction to try and decide all questions involved, sec. 8, p. 22
by publication, amendment of complaint, judgment by default, void, sec. 8, p. 23
common law defined, sec. 9, p. 28

different kinds of, sec. 9, p. 23
common law and equity, sec. 9, p. 23
differ mainly in remedies administered, sec. 9, p. 23
how remedies administered differ, sec. 9, pp. 23, 24, 25
principal cases or suits of exclusive equity jurisdiction, sec. 9, p. 24
in chancery, divided into ordinary and extraordinary, sec. 9, p. 25
difference between, sec. 9, p. 25
formerly common law and equity administered in separate courts, sec. 9, p. 25
now by same court in England, sec. 9, p. 25
and under the codes in this country, sec. 9, p. 26
but differently tried, how, sec. 9, p. 27
some formerly equitable have become statutory, sec. 9, p. 27
other divisions applicable to both equitable and common law, sec. 9, p. 28

how conferred and regulated,
federal courts by constitution and acts of congress, sec. 10, p. 28
state courts by state constitutions and statutes, sec. 10, p. 28
generally provided that shall have common law and equity, sec. 10, p. 29
so of admiralty and maritime, sec. 10, p. 29
courts of general exercise common-law jurisdiction, sec. 10, p. 29

Jurisdiction—*Continued.*
grant of, must proceed from competent authority, sec. 10, p. 29
can not be conferred by unconstitutional statute, sec. 10, p. 29
of state courts can not be conferred by act of congress, sec. 10, p. 29
may be exercised according to rules of common law or by special direction or informally, sec. 10, p. 29
must be exercised in manner provided by statute, sec. 10, p. 29
none but judges or judicial officers can exercise, sec. 10, p. 29
sometimes provided otherwise by statute, sec. 10, p. 29
authorize holding court by attorneys, sec. 10, p. 29
of subject-matter can not be conferred by consent, sec. 10, p. 29
how obtained, sec. 11, p. 30
of subject-matter, not by consent of parties, sec. 11, p. 30
by filing necessary pleading, sec. 11, p. 30
pleading must show subject-matter within jurisdiction of court, sec. 11, p. 30
not necessary that it state a cause of action, sec. 11, p. 30
over subject-matter will be presumed, sec. 11, p. 31
plaintiff's pleading determines, sec. 11, p. 31
special statutory mode must be followed or proceeding void, sec. 11, p. 31
of the person, by service of process or appearance, sec. 11, p. 31
of the *res* by seizure under process, sec. 11, p. 31
or acts of equivalent import, sec. 11, p. 31
to make effectual notice to parties interested must be given, sec. 11, p. 31
of the subject-matter,
subject-matter defined, sec. 12, p. 32
what actions are local, sec. 12, p. 32
affecting real estate must be brought where same is situated, sec. 12, p. 32
what complaint must allege to show jurisdiction. sec. 12, p. 32
of what courts will take judicial notice, sec. 12, p. 32
can not be given by consent of parties, sec. 12, p. 32
agreed case may take place of pleadings, sec. 12, p. 33
affidavit that controversy real and proceeding in good faith, necessary, sec. 12, p. 33
takes place of pleadings and process, sec. 12, p. 33
for specific performance where action must be brought, sec. 12, pp. 33, 34
appeal from court not having, to one having, jurisdiction, effect of, sec. 12, p. 34
personal actions, where may be brought, sec. 12, p. 35
divorce cases, where must be brought, sec. 12, p. 36
if court in which action brought has not jurisdiction, appellate court has none, sec. 12, p. 36
of the person, sec. 13,
may be conferred by consent of parties, sec. 13, p. 36
or by failure of defendant to object, sec. 13, p. 36
general appearance, in person or by attorney, gives, sec. 13, p. 37
what amounts to appearanc, sec. 13, p. 37
special appearance to contest does not give, sec. 13, p. 37
what will amount to special appearance, sec. 13, p. 37
special appearance gives in some states, by statute, sec. 13, p. 37
appearance may be entered by attorney, sec. 13, p. 38
effect of by unauthorized attorney. sec. 13, pp. 38–41
presumption that appearance was authorized, sec. 13, p. 41

Jurisdiction—*Continued.*
effect of recitals in record, showing appearance, sec. 13, p. 41
difference between domestic and foreign as to effect of, sec. 13, p. 41
when appearance will not give, sec. 13, p. 41
two kinds of service, actual and constructive, sec. 13, p. 41
difference between, sec. 13, pp. 41, 43
acknowledgment of service, how made and effect of, sec. 13, pp. 41, 42
personal judgment can be rendered only on personal service, sec. 13, p. 42
complaint can not be amended after constructive, sec. 13, p. 42
when constructive allowed, sec. 13, p. 42; sec. 38, p. 267
how service may be made on foreign corporations, sec. 14, p. 43
personal service on non-resident within state sufficient, sec. 13, p. 43
can be no appearance for a minor, sec. 13, p. 43
service on necessary, sec. 14, p. 43
constructive service, strict compliance with law necessary, sec. 13, p. 43
changed by statute in some states. sec. 13, p. 44
constructive unknown to common law, sec. 13, p. 44
order for, how procured in England, sec. 13, p. 44
in rem, sec. 14
difference between and *in personam* as to means of acquiring, sec. 14, p. 44
personal or actual notice not necessary, sec. 14, p. 44
acquired by seizure or levy on property, sec. 14, p. 44
or arises from some contract giving lien on property, sec. 14, p. 44
notice necessary to make effectual, sec. 14, p. 45
notice sometimes sufficient without seizure, sec. 14, p. 45
failure to give notice does not take away, sec. 14, p. 45
exception, sec. 14, p. 45
rule in attachment as to necessity of seizure, sec. 14, pp. 45, 46
when seizure of property not necessary, sec. 14, p. 46
when attachment proceedings are *in rem*, sec. 14, p. 47
necessary that court retain custody of property, sec. 14, p. 47
but may be released on bond. sec. 14, p. 47
property must be within jurisdiction of court, in attachment, sec. 14, p. 47
non-resident served in state gives, of person, sec. 14, pp. 47, 48
seizure of property and notice both necessary, sec. 14, p. 48
extent of, where no personal service, sec. 14, p. 48
complaint amended, new notice necessary, sec. 14, p. 49
to whom and how notice must be given, sec. 14, pp. 49, 50
when constructive notice allowed, sec. 14, p. 50; sec. 38
personal service out of state is constructive, sec. 14, p. 50
provisional remedies to reach property unknown to common law, sec. 14, p. 50
actual appearance of defendant necessary, sec. 14, pp. 50, 51
changes by statute in England, sec. 14, p. 51
and in this country, sec. 14, p. 51
territorial jurisdiction, sec. 15,
state or country can not exercise beyond its own territory, sec. 15, p. 51.
same rule applicable to similar subdivisions of government, sec. 15, p. 52

Jurisdiction—*Continued.*
but process of court of a county may, by statute, be made to extend throughout state, sec. 15, p. 52
but not into another state or country, sec. 15, p. 53
except by consent of such other state or country, sec. 15, p. 53
as to power to compel specific performance of contract to convey real estate situate in another state, sec. 15, p. 53
of lands situate partly in different counties, sec. 15, p. 54
where lands are situate partly in different states, sec. 15, p. 55
where action must be brought in federal courts, sec. 15, p. 56
as to the place of residence or citizenship of corporations, sec. 15, pp. 56, 57
receiver can not be appointed over property not within jurisdiction of court, sec. 15, p. 57
receiver can not pursue remedies in another state except by comity, sec. 15, p. 57
as to his right to sue in another state, sec. 15, pp. 57, 58
property once in possession of receiver within jurisdiction may follow into another state, sec. 15, p. 58
as to amount, sec. 16,
limitations of, as to amount, and effects, sec. 16, p. 59
legislature can not increase where constitution limits, sec. 16, p. 59
what controls in determining amount in controversy, sec. 16, p. 59, 60, 62, 63
what constitutes matters in controversy, sec. 16, p. 61
effect of rendition of verdict or judgment for less than jurisdictional amount, sec. 16, p. 61
remittitur of part to give jurisdiction effect of, sec. 16, p. 61
running account can not be divided to give, sec. 16, p. 62
federal courts, amount jurisdictional and must be averred in complaint, sec. 16, p. 62
defense reducing amount does not affect, sec. 16, p. 63
counterclaim or set-off does not affect, sec. 16, p. 63
receiver of national bank may sue in federal court irrespective of amount, sec. 16, p. 63
limitation does not apply where United States a party, sec. 16, p. 64
what considered in determining amount as to appellate jurisdiction, sec. 16, pp. 64–67
general rules as to manner of determining amount in controversy, sec. 16, pp. 67, 68
exclusive and concurrent, secs. 9, 17,
defined, sec. 9
exclusive, given to one court, no other can exercise, sec. 17, p. 68
if exclusive, given by constitution, legislature can not confer on another, sec. 17, p. 68
can not be taken away, but may be enlarged, sec. 17, p. 68
courts having concurrent, first assuming takes exclusive, sec. 17, p. 68
courts of concurrent, will not restrain proceedings commenced in another, sec. 17, p. 69
rule extends to process of courts mesne and final, sec. 17, p. 69
effect of rule on officer acting under process, sec. 17, pp. 69, 70, 71
effect of inability of court to carry cause to conclusion, sec. 17, pp. 71, 72
when court of equity may aid court of law, sec. 17, p. 72
actions *in rem*, court seizing property has exclusive, sec. 17, p. 72
new remedy provided, in what court must be pursued, sec. 17, p. 72

Jurisdiction—*Continued.*
admiralty exclusive in federal courts, sec. 17, p. 73
not confined to tide waters, sec. 17, p. 73
transfers from state to federal courts, effect of, sec. 17, p. 73
concurrent in state and federal courts in case of crimes, when, sec. 17, p. 74
assistant jurisdiction, sec. 18
what is and by what courts exercised, sec. 18, p. 74
difference between, and concurrent, sec. 18, p. 74
superseded by statutory proceedings and code provisions, sec. 18, pp. 74, 75
statutory modes of compelling production of documents and perpetuation of testimony, sec. 18, p. 75
and of discovery, sec. 18, p. 75
and proceedings supplementary, sec. 18, p. 75
will not be exercised when law court competent to grant relief, sec. 18, p. 76
difference in decided cases as to effect of providing statutory remedy, sec. 18, pp. 78, 79
what must be shown in bill as to other remedy, sec. 18, p. 80
statutory remedies controlled by equity principles, sec. 18, p. 80
terms of court as affecting, sec. 19 (see TERMS OF COURT)
proceedings at time or place other that fixed by law void, sec. 19, p. 81
stipulation can not render valid, sec. 19, p. 81
otherwise as to acts of judge, sec. 19, p. 81
vacation, what is, sec. 19, p. 81
special terms, notice of, necessary, sec. 19, p. 82
presumptions that court was legally in session, sec. 19, p. 82
powers of courts on Sunday, sec. 19, pp. 82, 83
power to continue sittings during term, sec. 19, p. 84
effect of adjournment as to power over judgments, sec. 19, p. 84
power in vacation, sec. 19, pp. 84, 85
premature adjournment by sheriff, effect of, sec. 19, p. 84
consent to hearing at special term, when necessary, sec. 19, p. 85
trial commenced, when court may be continued beyond term to complete, sec. 19, pp. 85, 86
term can not be abridged by adjournment, sec. 19, p. 86
judgment rendered during term may be entered in vacation, sec. 19, p. 86
but not when required to be read and signed in open court, sec. 19, p. 86
what necessary to constitute legal term, sec. 19, p. 87
term opened, presence of judge necessary, sec. 19, p. 87
calling judge as witness, effect of, sec. 19, p. 87
special and inferior, sec. 20
courts of, act by virtue of and controlled by statute, sec. 20, p. 88
provisions of statute must be followed, sec. 20, p. 88
proceedings must show jurisdiction on their face, sec. 20, p. 88
what sufficient showing, sec. 20, p. 88
what steps are jurisdictional, sec. 20, p. 89
can not be supplied by consent or waiver, when, sec. 20, pp. 89, 90, 94
when acquired, must be exercised as required by statute, sec. 20, p. 93

Jurisdiction—*Continued*
discretion of courts of, can not be controlled, sec 20, p 93
power to set aside judgments not incident to, sec 20, p. 93
can only be done in manner provided by statute, sec. 20, p. 94
court of general, when exercises special, sec. 20 p. 94
summary, statute must be followed strictly, sec. 20, p. 94
not summary, substantial compliance sufficient, sec. 20, p. 94
special mode of acquiring jurisdiction of person of non-resident, what necessary, sec. 20, p. 95
recitals in records, effect of, sec. 20, p. 96
original and appellate, sec. 21
defined and distinguished, sec. 21, p. 97
usually appellate extends only to final judgments, sec. 21, p. 98
but is statutory right, and may be extended, sec. 21, pp. 98, 99
difference between and writs of error, sec. 21, p. 98
court may be vested with both, sec. 21, p. 98
appellate court possessed of inherent and incidental powers, sec. 21, p. 98
on appeal cases usually tried by the record, sec. 21, p. 99
steps necessary must be taken within time prescribed, sec. 21, pp. 99, 100
upon failure, second appeal may be taken, when, sec. 21, p. 100
record of lower court conclusive, sec. 21, p. 100
no actual controversy, court not bound to act, sec. 21, p. 101
assignment of errors when necessary, and effect of, sec. 21, p. 101
fraud when excuses delay in taking necessary steps, sec. 21, p. 101
amendment of complaint on appeal for trial *de novo*, effect of, sec. 21, p. 102
when and how question of may be raised, sec. 22
depends on character of court, sec. 22, p. 103
and whether jurisdiction of subject-matter or person assailed, sec. 22, p. 103
failure to object when a waiver, and when not, sec. 23, pp. 103, 115, 118
appearance and failure to appear, effect of, sec. 22, pp. 103, 104
right to raise by demurrer, when, sec. 22, pp. 107–109, 116
when by plea, or by answer, sec. 22, pp. 108, 109
appeal when a waiver, sec. 22, p. 110
when raised by motion to vacate judgment, sec. 22, p. 111
by action to set aside judgment, sec. 22, p. 111
when court may refuse to entertain, sec. 22, p. 111
by motion for non-suit, sec. 22, p. 112
by motion in arrest of judgment, sec. 22, p. 112
in superior court without appeal, how, sec. 22, p. 112
by *certiorari*, sec. 22, p. 112
by prohibition, sec. 22, p. 112
by *habeas corpus*, sec. 22, p. 112.
on appeal, how, sec. 22, p. 112
by motion to dismiss, sec. 22, p. 112
or by assignment of error, sec. 22, p. 112
when must first be made in court below, sec. 22, p. 113
by assignment of error or demurrer, want of, must appear affirmatively, when, sec. 22, p. 113
rule in federal courts, sec. 22, pp. 113, 114
when by injunction, sec. 22, pp. 114, 115
power to vacate judgment when limited to term, sec. 22, p. 115
action brought in wrong county, how objection waived, sec. 22, pp. 115, 116

Jurisdiction—*Continued.*
officers return, effect of, sec. 22, pp. 116, 117
service obtained by fraud, court will not act, sec. 22, p. 117
where question of, as to subject-matter, may arise, sec. 22, p. 118
when objection may be made, sec. 22, p. 118
how may be questioned collaterally, sec. 22, pp. 118–120
what constitutes collateral attack, sec. 22, pp. 119, 120
when will be presumed, sec. 22, p. 120
who may contest, sec. 22, p. 120
judgment void on face, court may set aside, sec. 22, p. 121
appearance of attorney, effect of, sec. 22, p. 121
how proved and disproved, sec. 23
how and in what court question may arise, sec. 23, p. 122
proof necessary depends upon character of court, sec. 23, p. 122
when presumption alone establishes, sec. 23, pp. 123, 124
when law and pleadings will show, sec. 23, p. 123
difference between domestic and foreign judgment as to weight of presumption, sec. 23, pp. 123, 124, 125
when law of foreign state must be proved, sec. 23, pp. 123, 124
when certain steps necessary to give must be proved, sec. 23, p. 124
presumption when sufficient proof, sec. 23, p. 124
of what laws of other states, courts will take judicial notice, sec. 23, p. 125
difference between manner of alleging and proving, sec. 23, p. 125
of the person, how proved, sec. 23, p. 125
of inferior courts, must be by the record, sec. 23, pp. 125, 126
recital in record controlled by officer's return, sec. 23, pp. 126–143
finding of court conclusive, when, sec. 23, pp. 126–143
as to matters necessary to be alleged in petition, effect of finding, sec. 23, p. 126
difference between finding of fact and decision that court has jurisdiction, sec. 23, pp. 126–143
effect of provision of federal constitution, full faith and credit must be given to records of other states, sec. 23, p. 127
conflict in the decisions, sec. 23, p. 143
general propositions affecting questions, established by the authorities, sec. 23, pp. 144, 145
how lost, taken away, or suspended, sec. 24
vested by constitution can not be taken away by statute, sec. 24, pp. 146, 147
inherent powers can not be taken away, sec. 24, p. 146
can not be by agreement of parties, sec. 24, p. 146
how taken away by statute, sec. 24, pp. 146, 147
repeal of statute, effect of, sec. 24, p. 147
by failure of court to act in time, sec. 24, pp. 148–150
by appeal or writ of error, sec. 24, p. 150
by change of venue, sec. 24, pp. 151–153
by removal of causes, sec. 24, p. 153
by raising issue not within jurisdiction of court, sec. 24, p. 153
in actions *in rem*, by losing custody of property or failing to give notice, sec. 24, p. 154
suspended between terms of court and when judges not present, sec. 24, p. 154
by exhausting jurisdiction, sec. 24, p. 155
presumptions in favor of jurisdiction, sec. 25
general rule as to what will and what will not be presumed, sec. 25, pp. 155, 167, 168

Jurisdiction—*Continued.*
difference between courts of general and of special jurisdiction, sec. 25, pp. 155–162
difference between domestic and foreign courts as to, sec. 25, pp. 162, 163, 165
rule as to federal courts, sec. 25, p. 162
recitals in record, effect of, sec. 25, pp. 163, 165
presumption as to extent of jurisdiction once acquired, sec. 25, pp. 166, 167
effect of, want of, sec. 26
general rule, sec. 26, p. 168
when judgment shows on its face, effect, sec. 26, p. 168
difference between domestic and foreign judgments, sec. 26, p. 169
and between courts of general and of special jurisdiction, sec. 26, pp. 168, 169
inherent powers of courts, sec. 27
enumerated, sec. 27, p. 170
sometimes called incidental powers, sec. 27, p. 171
and divided into *formal* and *summary*, sec. 27, p. 171
can not be taken away, sec. 27, pp. 173, 174
but may be limited and regulated, sec. 27, p. 174
tendency of legislation to limit, sec. 27, p. 174
right to limit in contempt proceedings, sec. 27, p. 174
purposes of exercise in contempts, sec. 27, p. 175
power of superior court to review in cases of, sec. 27, p. 175
by *habeas corpus*, sec. 27, p. 176
two kinds of contempt, direct and constructive, sec. 27, p. 177
difference between as to power of courts to punish, sec. 27, p. 177
with respect to rules of court, sec. 27, pp. 177–180
to grant new trials, sec. 27, p. 180
of inferior courts, to punish for contempt, sec. 27, p. 181
to amend records, sec. 27, p. 181
powers of illegal and de facto courts, sec. 28
acts of illegal courts void, sec. 28, pp. 181, 182
of *de facto* judge or court valid, sec. 28, pp. 181, 182; sec. 33, p. 223
what constitutes *de facto* judge, sec. 28, p. 182
constitutional limitations of, sec. 29
division of departments of government, sec. 29, p. 183
one can not perform duties of another, sec. 29, p. 183
if they do their acts void, sec. 29, p. 183
judicial department may enforce ministerial duties, sec. 29, p. 183
but not acts calling for exercise of judgment and discretion, sec. 29, p. 183
may prevent violation of ministerial duty, sec. 29, pp. 183, 184
extent of power of court over officers of other departments, sec. 29, p. 184
ministerial, executive, judicial and legislative duties defined, sec. 29, pp. 185–187
makes no difference by whom act performed, sec. 29, p. 187
depends upon nature of the act, sec. 29, p. 187
how far may regulate or control legislative department, sec. 29, pp. 188, 191
construction of law by legislature, effect of, sec. 29, p. 191
courts determine constitutional limits of power of several departments, sec. 29, p. 191
judicial not bound by construction of laws by other departments, sec. 29, p. 193

Jurisdiction—*Continued.*
wisdom of law for legislative department alone to determine, sec. 29, p. 193
power to appoint to office is executive, sec. 29, p. 193
but other departments may appoint their own officers, sec. 29 pp. 193, 194
ministerial or legislative duties can not be imposed upon judicial officers, sec. 29, p. 194
nor judicial functions on other officers, sec. 29, p. 194
constitutionality of a law is judicial question, sec. 29, p. 195
in summary proceedings, sec. 30
regulated by statute, sec. 30, p. 197
are special, and statute must be strictly followed, sec. 30, p. 198
control of attorneys, sec. 31
attorneys are officers of court, sec. 31, p. 198
courts have inherent power to punish for contempt, sec. 31, pp. 198, 199
extends to suspension and disbarment, when, sec. 31, p. 198
legislature may regulate power, sec. 31, p. 198
for what causes attorneys may be disbarred, sec. 31, pp. 199, 200
pardon for offense does not affect power to disbar, sec. 31, p. 201
offense committed before federal court, state court may disbar, sec. 31, p. 201
means of acquiring jurisdiction generally, sec. 32
notice in some form necessary, sec. 32, p. 202; sec. 33, p. 211
pleading amended, new notice necessary, when, sec. 32, p. 202
manner of giving notice regulated by statute, sec. 32, p. 202
personal notice, when necessary, sec. 32, p. 203; sec. 33, pp. 213, 214
when constructive notice allowed, sec. 32, pp. 203, 204
what must be shown to authorize constructive, sec. 32, p. 203
notice other than process of court, when allowed, sec. 32, pp. 204, 205
notice may be waived, sec. 32, pp. 205, 206
due process of law, sec. 33
constitution of United States requires, sec. 33, p. 206
inhibition applies to states and state courts, sec. 33, p. 206
not confined to judicial proceedings, sec. 33, p. 206
apply to laws enacted by congress, sec. 33, p. 207
due process of law can not be defined, sec. 33, p. 207
meaning of, sec. 33, pp. 208, 212, 213
liberty, meaning of, sec. 33, p. 209
constitution requires:
notice to party,
opportunity to be heard,
that hearing be before court or other lawful tribunal,
that hearing be according to law and established principles, sec. 33, p. 211
proceeding in court not always necessary; sec. 33, pp. 212, 213
eminent domain, personal notice not necessary, sec. 33, p. 213
decision according to discretion, without evidence, notice not necessary, sec. 33, p. 213
states may provide kind of notice necessary, sec. 33, p. 213
general notice to all persons, when sufficient, sec. 33, pp. 214, 221
personal service, when necessary, sec. 33, pp. 213–218
when constructive notice sufficient, sec. 33, p. 219
special appearance, effect of, sec. 33, p. 219
legislature can not authorize injunction, when, sec. 33, pp. 219, 220

Jurisdiction—*Continued.*
may provide what amount of damages may be recovered, when, sec. 33, p. 220
notice not always necessary before action, sec. 33, p. 220
but action without notice can not be made conclusive, sec. 33, p. 220
police powers of states, how far may be exercised, sec. 33, p. 221
denial of jury trial, when denial of due process of law, sec. 33, pp. 222–224
legislature can not deny right to resort to courts, sec. 33, p. 222
commitment of court not having jurisdiction, effect of, sec. 33, p. 223
act of *de facto* court not void, sec. 33, p. 223
indictment, or presentment by grand jury, not esseutial, when, sec. 33, p. 223
trial after acquittal, effect of, sec. 33, p. 224
how far statutes may lawfully deprive citizens of their rights, sec. 33, p. 224
appearance and its effects, sec. 34
what is an appearance, sec. 34, p. 225
different kinds of, sec. 34, p. 225
general, what is, and its effect, sec. 34, pp. 225, 227–229, 231, 233
must be done in court, sec. 34, p. 225
appearance for removal of cause to federal court, effect of, sec. 34, pp. 226, 227
special appearance and its effects, sec. 34, pp. 227, 228, 231, 234
withdrawal of pleading does not withdraw appearance, sec. 34, p. 227
difference between illegal service and want of service, as to effect of appearance, sec. 34, p. 229
appeal, effect of as appearance, sec. 34, pp. 229–231
answer, when not a general appearance, sec. 34, p. 232
want of jurisdiction of subject-matter can not be waived, sec. 34, p. 232
special appearance gives jurisdiction in some states, sec. 34, p. 232
and applies to non-resident served out of state, sec. 34, p. 232
but doctrine exceptional, sec. 34, p. 232
effect of code provisions as to effect of appearance, sec. 34, pp. 232, 233
withdrawal of attorney withdraws pleadings, sec. 34, p. 233
effect of unauthorized appearance, sec. 34, p. 233
effect of appearance in main action upon auxiliary proceeding, sec. 34, pp. 233, 234
appearance can not be entered for minor without service of process, sec. 34, p. 234
nature and different kinds of process, sec. 35
original, difference between at common law and under codes, sec. 35, p. 234; sec. 36, p. 239
defined, sec. 35, p. 234
at common law action commenced by original writ, sec. 35, p. 234
original writ defined, sec. 35, p. 234
was the foundation of the suit, sec. 35, p. 235
was followed by *summons*, *attachment*, and *distringas*, to compel obedience, sec. 35, p. 235
in equity first process a *subpena*, sec. 35, p. 235
subpena defined, sec. 35, p. 235
other writs issued to compel appearance, sec. 35, p. 235
objects of common law and equity writs to *compel* appearance, sec. 35, p. 236
common-law writs proceeded against property, sec. 35, p. 236

Jurisdiction—*Continued.*
equity writs operated upon the person, sec. 35, p. 236
but property sequestered by court of equity, when, sec. 35, p. 236
under civil and ecclesiastical law personal citation issued, sec. 35, p. 236
called monition and adopted by admirality courts, sec. 35, p. 236
process under present practice not to *compel* attendance but to give *opportunity* to attend, sec. 35, p. 236
penalty for failure to attend is judgment by default, sec. 35, p. 236
common law and equity writs to compel appearance obsolete, sec. 35, p. 236
superseded by writ of summons, sec. 35, p. 236
summons defined, sec. 35, pp. 236, 237
in some of the states is a mere notice not issuing out of court, sec. 35, p. 237
but its object is the same, sec. 35, p. 237
sometimes denominated a *citation*, or *notice*, sec. 35, p. 237
subpena still in use in federal and some state courts, sec. 35, p. 237
but sometimes modified in form, sec. 35, p. 238
in many proceedings, as in matters of probate, *notice* provided for, sec. 35, p. 238
in federal courts *monition* of the civil law still in use, sec. 35, p. 238
may be general to all persons, or special to individuals named, or mixed, containing special directions to all persons and special summons to particular persons, sec. 35, p. 238
citation defined, sec. 35, p. 238
does not differ materially from summons, sec. 35, p. 238
all original process in the several states essentially the same, sec. 35, p. 238
changes made in original process in England, sec. 35, p. 238
provision usually made for publication when personal service can not be had, sec. 35, p. 239
notice required in appellate courts, sec. 35, p. 239
requisites of process, sec. 36
importance of form under common law practice, sec. 36, p. 239
at present day is of little consequence, sec. 36, p. 239
objects of, sec. 36, p. 239
general requisites of, sec. 36, pp. 239, 240
must conform substantially to requirements of statute, sec. 36, p. 240
defective, when sufficient to give jurisdiction, sec. 36, p. 240
certainty required in, sec. 36, p. 241
name of person to be summoned must appear in, sec. 36, p. 241
variance in name when will not vitiate, sec. 36, p. 241
to whom must be directed, sec. 36, p. 241
authorized to issue to certain officer, if another officer disqualified, disqualification must exist, sec. 36, p. 241
when form of depends upon nature of action, sec. 36, p. 242
effect of variance between summons and complaint, sec. 36, pp. 242, 243
which controls, complaint or summons, sec. 36, p. 242
when variance will be presumed to have worked injury, sec. 36, p. 242
when statute fixing form held to be mandatory, and summons fatally defective, sec. 36, p. 243

Jurisdiction—*Continued.*
distinction between cases where clerk enters default and where relief is asked of court, as to effect of variance, sec. 36, pp. 243, 244
literal compliance with statute not necessary, sec. 36, p. 244
general statement of cause of action sufficient, sec. 36, p. 245
clerk of one court can not issue returnable in another court unless expressly authorized, sec. 36, p. 245
signature of clerk necessary, sec. 36, p. 245
except when authorized to be signed by plaintiff or his attorneys, sec. 36, p. 245
printed signature sufficient, sec. 36, p. 245
how must be tested, sec. 36, p. 245
teste matter of form and may be amended, sec. 36, p. 246
must bear seal of court, sec. 36, p. 245
but may be amended by attaching seal, sec. 36, pp. 245, 246
even after judgment, sec. 36, p. 246
such summons defective, but not void, sec. 36, p. 246
but as to this the authorities are conflicting, sec. 36, pp. 246, 247
failure to comply with requirement that shall run in name of state, renders irregular, but not void, sec. 36, p. 247
issuance of, is ministerial act, sec. 36, p. 247
and clerk may issue in action in his own behalf, sec. 36, pp. 247, 248
but can it be issued to sheriff or other officer in his own action? sec. 36, p. 248
effect of service by one officer of writ directed to another, sec. 36, p. 248
notice must be authorized by law, or is no notice, sec. 36, p. 248
summons issued on Sunday, when will be upheld, sec. 36, p. 249
when summons may issue, sec. 36, p. 249
generally after complaint filed, sec. 36, p. 249
and if issued before, is void, sec. 36, p. 249
different rule in some states, sec. 36, p. 249
alias summons, when may issue, sec. 36, p. 249
return day, what is, sec. 36, p. 249
time when made returnable affects validity, when, sec. 36, pp. 249, 250
must be returnable on day required by statute, sec. 36, p. 250
made returnable on legal holiday, not void, sec. 36, p. 250
but will be returnable first judicial day thereafter, sec. 36, p. 250
made returnable for wrong hour in the day, effect of, sec. 36, p. 250
failure to indorse name of attorney for plaintiff on, effect of, sec. 36, pp. 250, 251
when summons aided by complaint attached, sec. 36, p. 251
service of process, sec. 37
governed by statute, sec. 37, p. 251
statutes of different states substantially the same as to material matters, sec. 37, p. 251
but differ as to matters of form, sec. 37, p. 251
purpose and object of such statutes, sec. 37, p. 251
due service necessary to give jurisdiction, sec. 37, p. 252
by whom may be made, sec. 37, p. 252
generally by officers designated by statute, sec. 37, p. 252
but may be by private individuals when authorized by law, sec. 37, 252
when by special deputies, sec. 37, p. 252

Jurisdiction—*Continued.*
distinction between general and special deputies as to power to serve, sec. 37, p. 253
power of special, limited to county covered by appointment, sec. 37, p. 253
so when limited to service of particular writ, sec. 37, p. 253
but service not void where could serve as private individual, sec. 37, p. 253
but proof of such service must be by affidavit and not by return, sec. 37, p. 253
appointment of special bailiff without seal, effect of, sec. 37, p. 254
failure to indorse appointment on writ, effect of, sec. 37, p. 254
power of constable to appoint deputy, and powers of, sec. 37, p. 254
sheriff can not serve out of his county, sec. 37, p. 254
nor can private individual, sec. 37, p. 254
direction of writ to wrong officer, effect of, sec. 37, pp. 254, 255
rule where proper officer is claimed to be disqualified, sec. 37, p. 255
effect of service by private individual, sec. 37, p. 255
general rule that officer can not serve process in his own case, sec. 37, p. 255
but held in some cases rule not applicable to summons, sec. 37, p. 255
and this is the better rule, sec. 37, p. 255
only objection to such service is liability to false return, sec. 37, p. 256
where statute provides for service by disinterested person, service by interested party void, sec. 37, p. 256
conditional authority of court to appoint private individual to serve, conditions must exist or service void, sec. 37, p. 256
but will be presumed if not required to be affirmatively stated in writ, sec. 37, p. 256
otherwise if required to be stated, sec. 37, p. 256
if reasons for appointment not set out, when required, can not be amended after service, sec. 37, p. 256
must appear that private individuals have statutory qualifications, sec. 37, p. 256
indorsement on original, authorizing party to serve, does not authorize service of *alias*, sec. 37, p. 257
when may be served, sec. 37, p. 257
generally not before filing of complaint, sec. 37, p. 257
nor after return day, sec. 37, p. 257
alias must issue in such case, sec. 37, p. 257
held may be dated, issued, and returned on return day, sec. 37, p. 257
service on return day voidable, not void, sec. 37, p. 257
where may be served, sec. 37, p. 257
not beyond territorial jurisdiction of court issuing, sec. 37, p. 257
unless expressly authorized, sec. 37, pp. 257, 258
but service out of jurisdiction may be authorized by statute, sec. 37, p. 258
service out of county usually provided for, sec. 37, p. 258
and sometimes out of state, sec. 37, p. 258
non-resident temporarily within state may be served, sec. 37, p. 258
exception where in attendance at court as party or witness or going or coming, sec. 37, p. 258
must have reasonable time to return to his state, sec. 37, p. 258

Jurisdiction—*Continued.*
some cases hold exemption only applies to attendance under writ involving arrest, sec. 37, p. 259
but weight of authority the other way, sec. 37, p. 259
extends to person attending before officer to give deposition, sec. 37, p. 259
but not where deposition to be used in another state, sec. 37, p. 259
immunity does not depend upon statute, sec. 37, p. 259
nor upon citizenship, sec. 37, p. 259
applies to resident of state attending out of his county, sec. 37, pp. 259, 260
but sometimes held service on resident out of county not void, but entitles to change of venue, sec. 37, p. 259
distinction between resident and non-resident in case of arrest, sec. 37, p. 259
exception extends to one induced to come within jurisdiction by fraud, sec. 37, pp. 260, 261
rule applies to officer of corporation, sec. 37, p. 261
member of congress privileged while in attendance at session and going and returning, sec. 37, p. 261
deviation from direct route, effect of, sec. 37, p. 261
rule applies to members of legislature, sec. 37, p. 261
in some cases confined to process involving arrest, sec. 37, p. 261
but better rule extends it to civil process not involving arrest, sec. 37, p. 261
question of privilege, how raised, sec. 37, p. 261
what necessary to authorize service on joint defendant residing out of county, sec. 37, p. 261
resident defendant must have real interest adverse to plaintiff, sec. 37, pp. 261, 262
defective service, how question of, raised, sec. 37, p. 262
distinction between void and defective, as to time and manner of raising objection, sec. 37, p. 262
how may be served, sec. 37
personal service generally required, sec. 37, p. 262
what will constitute personal service, sec. 37, p. 262
leaving copy at place of residence, what necessary, sec. 37, pp. 262, 263
strict compliance with statute required, sec. 37, p. 262
summons for wife, leaving copy with husband, effect of, sec. 37, p. 262
generally copy of complaint must be served with, sec. 37, p. 263
when required, service of such copy necessary to give jurisdiction, sec. 37, p. 263
where certified copy required, copy not certified insufficient, sec. 37, p. 263
service on partners, what sufficient, sec. 37, p. 263
variance between copy served and original, effect of, sec. 37, p. 264
service on minors, what necessary, sec. 37, p. 264
on insane persons, sec. 37, p. 265
on married women, sec. 37, p. 265
on persons acting in official capacity, sec. 37, p. 266
constructive service of process, sec. 38
meaning of, sec. 38, p. 266
includes personal service out of state, sec. 38, p. 266
is exceptional mode of service, sec. 38, p. 266

Jurisdiction—*Continued.*
statutes authorizing, must be complied with, sec. 38, p. 266
division of the subject, sec. 38, p. 266
a. *in what cases allowed*, sec. 38, p. 267
under control of the states, sec. 38, p. 267
general rule, personal action can not be maintained on, sec. 38, p. 267
either against resident or non-resident, sec. 38, p. 267
personal judgment, what is, sec. 38, p. 268
allowed in actions *in rem*, and attachment, sec. 38, p. 269
but relief confined to property, sec. 38, p. 269
seizure of property generally necessary, sec. 38, p. 270
and notice, sec. 38, p. 270
allowed in cases to enforce specific liens on property within jurisdiction, sec. 38, p. 270
as in case of mortgage on real or personal property, sec. 38, p. 270
proceedings affecting title to real estate, sec. 38, p. 270
to set aside fraudulent conveyances, sec. 38, p. 270
actions to quiet title, sec. 38, p. 270
to abate nuisances, sec. 38, p. 270
to establish trusts in real estate, sec. 38, p. 270
in such cases jurisdiction depends upon presence of property, sec. 38, p. 270
and personal judgment can not be rendered, sec. 38, p. 270
allowed in cases affecting *status* of parties, as in divorce, sec. 38, p. 270
but can be no personal judgment on, as for alimony, sec. 38, p. 270
independent of statute courts can not authorize, sec. 38, p. 271
courts of equity when may authorize service on other person for non-resident, sec. 38, p. 271
b. *the affidavit*, sec. 38, p. 271
making of is jurisdictional, sec. 38, p. 271
what must be shown by, sec. 38, pp. 271, 272
may be sufficient to give jurisdiction but defective and subject to direct attack, sec. 38, p. 272
what must contain governed by statute, sec. 38, pp. 272, 273
but every step required may be taken and yet service is void, when, sec. 38, pp. 272, 273
how fact of non-residence may be established, sec. 38, p. 273
facts required to be stated in, can not be supplied by other evidence, sec. 38, p. 273
held not to be part of judgment roll, sec. 38, pp. 273, 274
and that was made will be presumed, sec. 38, p. 274
must appear from that case is one for constructive notice, when, sec, 38, p. 274
when complaint may be looked to for cause of action, sec. 38, pp. 274, 275
general statement of cause of action sufficient, sec. 38, p. 275
not always sufficient to follow language of statute, sec. 38, p. 275
diligence to find defendant for personal service, what showing of necessary, sec. 38, pp. 275, 276, 277
facts as to what was done must be stated, sec. 38, p. 275
but any facts tending to show gives court jurisdiction to determine question, sec. 38, p. 275

Jurisdiction—*Continued.*
what constitutes due diligence can not be definitely stated, sec. 38, pp. 275, 276
allegation of property within jurisdiction, how must be made, sec. 38, p. 276
what may be stated on information and belief, sec. 38, p. 276
that defendant is out of state must be positive and direct, sec. 38, p. 276
absence from state, what sufficient, sec. 38, pp. 276, 277
strictness required in stating nature of action, sec. 38, p. 277
name of party to be published against necessary, sec. 38, p. 277
except where defendant may be sued under fictitious name, sec. 38, p. 277
then must be shown that true name is unknown, sec. 38, p. 277
false statement of cause of action in, effect of, sec. 38, p. 277
does not affect jurisdiction of court, sec. 38, p. 278
of non-residence must relate to time of order for publication, sec. 38, p. 278
how near the time must be made, sec. 38, p. 278
need not be made at time complaint is filed, sec. 38, p. 278
in some states complaint must be filed *after* proof of publication, sec. 38, p. 278
and if filed before judgment void, sec. 38, p. 278
when affidavit may be amended, sec. 38, p. 279
difficulty of making personal service no ground for publication, sec. 38, p. 279
insufficiency of complaint not ground for attacking notice, sec. 38, p. 279
c. *officer's return as basis for publication*, sec. 38, p. 279
facts necessary for when may be shown by, sec. 38, p. 279
what must be shown by, sec. 38, p. 279
d. *order of publication*, sec. 38, p. 280
must require all acts to be done that statute requires, sec. 38, p. 280
is the authority for making the service, sec. 38, p. 280
and proper service without necessary order therefor is void, sec. 38, p. 280
what order must contain, sec. 38, pp. 280, 281
e. *the publication*, sec. 38, p. 281
what must be, governed by statute, sec. 38, p. 281
in some states summons published, sec. 38, p. 281
in others notice containing its substance, sec. 38, p. 281
irregularities do not render void, sec. 38, p. 281
but distinction in this respect between personal and constructive service, sec. 38, pp. 281, 282
publication for less than required time, effect of, sec. 38, pp. 282, 283
rule in cases of petition by guardian for sale of ward's property, sec. 38, p. 283
petition said to give jurisdiction in such cases, sec. 38, p. 283
relief demanded of which notice is given limits jurisdiction to granting such relief, when, sec. 38, p. 284
death of defendant pending publication, new notice necessary, sec. 38, p. 284
where publication measured by months calendar months meant, sec. 38, p. 284

Jurisdiction—*Continued.*
what is sufficient length of time for publication, sec. 38, p. 284
f. *proof of publication*, sec. 38, p. 284
validity of judgment does not depend upon, sec. 38, p. 284
but upon fact of publication, sec. 38, p. 284
therefore may be supplied after judgment, sec. 38, p. 285
and may be amended, sec. 38, p. 285
failure to make is irregularity merely, sec. 38, p. 285
but judgment void on face right to supply or amend subject to intervening rights, sec. 38, p. 285
facts of publication may be established, how, sec. 38, p. 285
by whom affidavit may be made, sec. 38, p. 285
warning order takes place of summons, and proof the place of officer's return, sec. 38, p. 286
facts appearing in, by way of recital, effect of, sec. 38, p. 286
after many years slight proof sufficient, sec. 38, p. 286
g. *personal service out of state*, sec. 38, p. 286
is constructive service, sec. 38, p. 286
and allowed on like showing as for publication, sec. 38, p. 286
and usually length of service the same, sec. 38, p. 286
proof of personal service of process, sec. 39
service, not proof of, gives jurisdiction, sec. 39, p. 287
service by officer proof of by his return, sec. 39, p. 287
by private individual by his affidavit, sec. 39, p. 287
but such modes not exclusive, but proof may be made otherwise, sec. 39, p. 287
but sometimes held can not be by parol, sec. 39, p. 287
and this so where question arises on appeal, sec. 39, pp. 287, 288
facts necessary to show valid service must be shown, sec. 39, p. 288
competency of private individual to serve must be shown, when, sec. 39, p. 288
but failure to show mere irregularity, sec. 39, p. 288
in other respects return and affidavit the same, sec. 39, p. 288
what sufficient to be shown, sec. 39, pp. 288, 289
service of copy of complaint must appear, when, sec. 39, p. 289
and certified copy, sec. 39, p. 289
how writ must be delivered, sec. 39, p. 289
service by mail, what sufficient proof of, sec. 39, p. 289
strictness required where service by leaving copy, sec. 39, p. 290
must show place of service, sec. 39, p. 290
but when will be presumed to have been within jurisdiction, sec. 39, p. 290
failure to give name of party served; service a nullity, sec. 39, p. 290
variance in name in summons and return, effect of, sec. 39, p. 290
action against husband and wife, effect of proof of service on husband, sec. 39, p. 290
proof necessary where service allowed on one person if another not found, sec. 39, p. 291
service how shown by acceptance of, sec. 39, p. 291
by third party authority must appear, sec. 39, p. 291
can not be made by a minor, or by guardian for him, sec. 39, p. 291
genuineness of signature to acceptance must be shown, when, sec. 39, p. 291
service out of state, what necessary, sec. 39, p. 292
what necessary as to time of service, sec. 39, p. 292
return may be amended even after judgment, sec. 39, p. 292

Jurisdiction—*Continued.*
but subject to intervening rights, when, sec. 39, p. 292
must be upon notice, when, sec. 39, p. 292
found defective on appeal, effect of, sec. 39, p. 293
when verification of return necessary, sec. 39, p. 293
by deputy, must be in name of principal sec. 39, p. 293
by special deputy, how proof made, sec. 39, p. 293
need not appear that service was by deputy, when, sec. 39, p. 293
effect of return in name of special deputy, sec. 39, p. 294
time when return should be made, sec. 39, p. 294
effect of return, whether conclusive or not, sec. 39, p. 294
proof by private individual may be contradicted, sec. 39, p. 295
defects in return not ground for quashing writ, sec. 39, p. 295
due service when presumed, sec. 39, p. 295
but proof showing insufficient service not aided by presumption, when, sec. 39, p. 295
degree of exactness required in proof, sec. 39, p. 295
distinction between personal and constructive service, sec. 39, pp. 295, 296
question on appeal not necessarily one of jurisdiction, sec. 39, p. 296
jurisdiction should not be allowed to fail for want of formal proof, sec. 39, pp. 296, 297
defective process and service, sec. 40
distinction between defective and void service, sec. 40, pp. 297, 299
former confers jurisdiction, latter not, sec. 40, p. 297
latter ground for collateral attack, former not, sec. 40, p. 297
proof may be amended, sec. 40, p. 298
when can not be amended after appeal, sec. 40, p. 298
distinction between actual and constructive service as to effect of, sec. 40, pp. 298, 299
waiver of process and service and defects therein, sec. 41
effect of general appearance, sec. 41, p. 300
is equivalent to service, sec. 41, p. 300
persons under disabilities can not waive, sec. 41, p. 300
nor can their guardians, sec. 41, p. 300
exceptions in case of guardians, sec. 41, p. 300
service on minor necessary to authorize appointment of guardian *ad litem*, sec. 41, p. 301
and person appointed can do no act conferring jurisdiction, sec 41, p. 301
effect of such appointment and appearance, sec. 41, pp. 301, 302
distinction between and failure to appoint where there is service, sec. 41, p. 302
recitals in record binding on minors, sec. 41, p. 302
when service on minor not necessary to give jurisdiction, sec. 41, p. 302
in case of petitions in proceedings not adversary, sec. 41, p. 302
attorney can not waive service on minor, sec. 41, p 303
receipt of benefits of judgments effect of as waiver, sec. 41, p. 303
agreement to waive return of service, effect of, sec. 41, p. 303
summons by wrong name, effect of appearance, sec. 41, p. 303
setting up objections, effect of as waiver of other objections, sec. 41, p. 303
failure to appear and object, effect of, sec. 41, p. 303
time within which objection to defects may be taken, sec. 41, p. 304
relief on account of fraud, sec. 41, p. 304
acceptance of service, effect of as a waiver, sec.41, p. 304

Jurisdiction—*Continued.*
authority of agent to waive, sec. 41, p. 304
waiver without appearance, how may be done, sec. 41, pp. 304, 305
bringing action in wrong county, how waived, sec. 41, p. 305
appearance and contest of service does not waive right to writ of error, sec. 41, p. 305
of new parties and amended pleadings, sec. 42
when new parties made, how jurisdiction obtained, sec. 42, p. 305
no new service necessary when new parties plaintiff made, sec. 42, p. 305
auxiliary proceedings in equity service may be made on attorneys, when, sec. 42, p. 305
an amendment of complaint where no appearance when new service necessary, sec. 42, p. 306
new parties when new service on original parties necessary, sec. 42, p. 306
presumptions in such cases, sec. 42, p. 306
substituted plaintiff no new process necessary, sec. 42, pp. 306, 307
or where name of plaintiff stricken out, sec. 42, p. 307
in case of death of defendant and substitution of representative or heir, what notice necessary, sec. 42, pp. 307, 308
when cause pending on writ of error, sec. 42, p. 307
decision after death relates back, sec. 42, p. 307
on reversal, what necessary in court below, in case of death, sec. 42, p. 307
in actions against corporations, sec. 43
manner of making service on, difference between and on natural persons, sec. 43, p. 308
statutes compelling submission of, to service out of state as condition of doing business, sec. 43, p. 308
constitutionality of such statutes upheld, sec. 43, p. 308
conditions must be reasonable, sec. 43, pp. 308, 309
right to serve in state other than that of its creation wholly statutory, sec. 43, p. 309
right to sue in foreign state not confined to actions growing out of business done therein, sec. 43, p. 309
distinction as to corporations acting under interstate commerce law, sec. 43, p. 310
corporation not a citizen within meaning of constitution, sec. 43, p. 310
and state may impose conditions upon which it may do business therein, sec. 43, p. 311
right to trial within county or state of residence a personal privilege and may be waived, sec. 43, p. 311
corporation doing business in state where conditions imposed waives right to be sued elsewhere, sec. 43, p. 311
but can not, independently of such statute, be sued out of its state, sec. 43, pp. 311, 212
upon whom service on may be made, sec. 43, pp. 313–316
as to manner of service statute must be strictly pursued, sec. 43, p. 316
"station agent," meaning of, sec. 43, p. 316
return of officer as to kind of officer served, effect of, sec. 43, p. 316
service on two officers required, service on one insufficient, sec. 43, pp. 316, 317
"general agent" and "managing agent," meaning of, sec. 43, pp. 317, 318
may be sued in any county, sec. 43, p. 318

Jurisdiction—*Continued.*
agent or officer can not be served outside of territory he represents, sec. 43, pp. 318, 319
or outside of county in which public corporation is situated, sec. 43, p. 319
service on officer in foreign state, must be at the time acting for the corporation in such state, sec. 43, p. 319
service may be on mere clerk if statute authorizes, sec. 43, p. 319
what will amount to such doing business as to authorize service in foreign state, sec. 43, pp. 319, 320
presence of officers alone will not authorize, when, sec. 43, p. 320
service by publication may be had, when, sec. 43, p. 321
when may be sued in state of residence of either plaintiff or defendant, sec. 43, p. 322
sometimes right to serve depends upon presence of property within jurisdiction, sec. 43, p. 322
in federal court law of state in which court held controls, when, sec. 43, pp. 322, 323
different rule as to service where corporation created by act of congress, sec. 43, p. 323
may be sued in any state where is doing business, sec. 43, p. 323
doing business in another state does not change place of cizenship, sec. 43, pp. 323, 324
where cross complaint is filed, sec. 44
new parties brought in by must be served, sec. 44, p. 324
but if against parties before the court, not necessary, sec. 44, p. 324
when party must take notice of all pleadings filed, sec. 44, p. 324
where service is not necessary in case of default under original complaint, sec. 44, p. 324
when service of pleading, without summons, sufficient, sec. 44, p. 324
stranger coming in and setting up cause of action, summons must issue, sec. 44, p. 325
in equity service may be made on attorney, sec. 44, p. 325
commencement of action in wrong place and its effects, sec. 45
at common law in local actions venue must be properly laid, sec. 45, p. 326
rule modified by statutes, sec. 45, p. 326
action in wrong county, party must demand change of venue, sec. 45, p. 326
appearance without objection, when waives bringing in wrong county, sec. 45, p. 327
when application for change must be made, sec. 45, p. 327
failing to appear, party can not raise question. sec. 45, p. 327
where no statute authorizes change, what remedy may be had, sec. 45, p. 327
distinction between transitory and local actions, sec. 45, p. 327
in former jurisdiction given by consent, in latter not, sec. 45, p. 327
in latter court has no jurisdiction if action brought in wrong county, sec. 45, p. 328
but legislature may change this rule, sec. 45, p. 328
statute requiring application for change in local actions, rule of waiver applies as in transitory actions, sec. 45, p. 328
held statute in general terms applies to local actions, sec. 45, p. 328
cases to contrary, sec. 45, p. 328
different rule in other states, sec. 45, p. 330

Jurisdiction—*Continued.*
distinction applied to actions purely *in rem.*, sec. 45, p. 330
independent of statute jurisdiction may be attacked without application for change, sec. 45, p. 331
actions made local by constitution, effect of, sec. 45, p. 331
statutes changing rule modify statutes fixing place of trial, sec. 45, p. 331
effect of application for change, sec. 45, p. 332
deprives court of jurisdiction, sec. 45, p. 332
right to have action brought in certain county personal privilege, when, sec. 45, p. 332
and may be waived when, sec. 45, p. 332
action against several, any one may have change, sec. 45, p. 332
right to change, when absolute, sec. 45, p. 332
effect of constitution requiring actions to be *commenced* in certain county, sec. 45, p. 333
may be tried in other county, sec. 45, p. 333
distinction between jurisdiction of general subject-matter and particular cause of action, sec. 45, p. 333
action in wrong county can not be dismissed, when, sec. 45, p. 333
action on appeal, when change may be had, sec. 45, p. 334
rule as to non-residence, sec. 45, p. 334
grounds of change of venue, sec. 46
are purely statutory, sec. 46, p. 334
different in different states, sec. 46, p. 334
enumerated, sec. 46, pp. 334, 335
effect on jurisdiction of different grounds, sec. 46, p. 335
when right to change is absolute, effect of application for, sec. 46, p. 335
failure to make application, effect of, sec. 46, p. 335
disqualification of judge, effect of, sec. 46, pp. 335, 336, 342
no application for change necessary, sec. 46, p. 335
duty to decline to act, sec. 46, p. 335
application made, subsequent acts void, sec. 46, p. 336
bias or prejudice of inhabitants, jurisdiction not involved, sec. 46, p. 336
right of change for, whether absolute or not, sec. 46, p. 336
counter evidence may be given, sec. 46, p. 336
different rule in some states, sec. 46, p. 337
whether application, or order for change, ousts jurisdiction, sec. 46, p. 337
judge attorney for party, effect of, sec. 46, p. 337
what will constitute him such attorney, sec. 46, p. 337
judge witness in cause, effect of, sec. 46, p. 338
effect of joining cause removable with one not removable, sec. 46, p. 338
application for change and its effects, sec. 47
must be made within time fixed by statute, sec. 47, p. 338
subject to right to relief for excusable neglect, mistake, etc., sec. 47, p. 338
time for, fixed by rules of court, effect of, sec. 47, p. 338
cause not discovered until after time, effect of, sec. 47, p. 339
number of changes that may be had, sec. 47, p. 339
nature and form of, governed by statute, sec. 47, p. 339
what is usually required, sec 47, pp. 339, 340
statute must be complied with, sec. 47, p. 340
more than statute requires can not be required by rule of court, sec. 47, p. 340

Jurisdiction—*Continued.*
no vested right to, statute may be changed, sec. 47, p. 340
infant may make affidavit for, sec. 47, p. 340
affidavit may be amended, sec. 47, p. 340
what affidavit must contain, sec. 47, pp. 340, 341
when judge may take into account his own knowledge, sec. 47, pp. 341, 342
on ground of convenience of witnesses, when made, sec. 47, p. 342
fraudulently joining resident to give jurisdiction over non-resident, effect of, sec. 47, p. 342
other necessary proceedings to procure transfer, sec. 48
usually affidavit alone necessary, sec. 48, p. 343
but in some cases written demand required, sec. 48, p. 343
payment of costs and transmission of papers, sec. 48, p. 343
pending performance of conditions after application, where jurisdiction rests, sec. 48, p. 343
in what cases conditions not imposed, sec. 48, p. 343
presumption that conditions not performed, when, sec. 48, p. 344
relief from failure to perform in time, sec. 48, p. 344
court can not impose conditions not required by statute, sec. 48, p. 344
waiver as to venue, sec. 49
right to trial in particular place may be waived, sec. 49, p. 344
distinction between transitory and local actions, sec. 49, p. 344
failure to apply for change in time waives, when, sec. 49, pp. 344, 345
when required to be made, sec. 49, p. 345
when may be renewed, sec. 49, p. 346
when objection may be made at the trial, sec. 49, p. 346
failure to comply with subsequent conditions, effect of, sec. 49, p. 346
defects in application, how waived, sec. 49, p. 346
consent to change waives application, sec. 49, p. 346
appearance in court to which action removed, effect of, sec. 49, p. 347
counter motion to retain case, sec. 50
action brought in wrong county, convenience of witnesses no defense to application for change, sec. 50, p. 347
counter motion to retain not proper, sec. 50, p. 347
when counter motion to retain may be considered, sec. 50, pp. 347, 348
when counter motion not necessary to retain case, sec. 50, p. 348
convenience of witnesses, when may be considered, sec. 50, p. 348
order for change and its effects, sec. 51
whether application or order divests court of jurisdiction, sec. 51, pp. 348, 349
depends upon ground of application and whether right is absolute, sec. 51, p. 349
if absolute order made as of course, sec. 51, p. 346
and application terminates or suspends jurisdiction, sec. 51, p. 349
only suspends jurisdiction, when, sec. 51, p. 349
revived by failure to comply with subsequent conditions, sec. 51, p. 349
what vests jurisdiction in court to which transfer ordered, sec. 51, p. 349
power of courts from and to which change ordered, pending performance of conditions, sec. 51, p. 349

Jurisdiction—*Continued.*
order at what time vests court to which removed with jurisdiction, sec. 51, pp. 349, 350
failure to perform conditions, court making order may set it aside, sec. 51, p. 350
when appears from order that no legal cause for change, other court should refuse to act, sec. 51, p. 350
otherwise where facts authorizing do not exist, but does not appear from record, sec. 51, p. 350
question as to cause for removal must be contested when application made, when, sec. 51, p. 350
when order does not transfer jurisdiction, sec. 51, pp. 350, 351
presumption that court acted rightly in granting change, sec. 51, p. 351
but if change not authorized under any circumstances order granting a nullity, sec. 51, p. 351
proceedings defective, order erroneous only, sec. 51, p. 351
when order may be collaterally attacked, sec. 51, p. 351
when question on appeal one of law, sec. 51, pp. 351, 352
when order granting conclusive, sec. 51, p. 352
conditional order, when may be made, sec. 51, p. 352
when court may set aside order, sec. 51, p. 352
remanding cause, sec. 52
when order granting void, no order remanding necessary, sec. 52, p. 352
and court to which transferred has no jurisdiction to remand, sec. 52, p. 352
court may be prevented from proceeding, sec. 52, p. 352
and court making order compelled to proceed, sec. 52, pp. 352, 353
held, court may order re-transfer, sec. 52, p. 353
irregular transfer, how taken advantage of, sec. 52, p. 354
judges defined, sec. 53
all officers performing judicial functions considered here, sec. 53, p. 354
what officers acting judicially not judges, sec. 53, p. 354
what officers are judges, sec. 53, p. 355
power of legislature to confer and take away jurisdiction, sec. 54
powers may be constitutional or by virtue of statutes, sec. 54, p. 355
if constitutional legislature can not limit or control, sec. 54, p. 355
can not be given to commission, sec. 54, pp. 355, 356
legislature can not vest non-judicial officers with judicial powers, sec. 54, p. 356
nor can such powers be conferred by consent, sec. 54, p. 356
same officer may perform judicial and other functions, sec. 54, p. 356
but power to confer judicial and other powers on same officers depends on constitution, sec. 54, p. 356
different departments of government separated by constitutions, sec. 54, p. 356
under such constitutions, judicial powers can not be given to executive or legislative officer, sec. 54, p. 356
same where constitution vests all judicial power in courts, sec. 54, pp. 356, 357
what acts not within constitutional inhibition, sec. 54, p. 357
effect of constitutional provision on existing statutes vesting jurisdiction in officers not named therein, sec. 54, p. 357

Jurisdiction—*Continued.*
power vested in *courts* by constitution can not be vested in *judges* by statute, sec. 54, pp. 357, 358
when question whether judicial or not may be determined from legislative act, sec. 54, p. 358
judge may have jurisdiction over matters of which his court has none, sec. 54, p. 358
contempt, power of non-judicial office to punish for, sec. 54, p. 359
when judge can not be deprived of office by statute, sec. 54, p. 360
special judges, power of legislature to provide for, sec. 54, p. 360
power of legislature to impose other than judicial duties on judges, sec. 55
judges can not be compelled to perform non-judicial duties, sec. 55, p. 361
but may perform ministerial functions, sec. 55, p. 362
nature of act not changed because performed by a judge, sec. 55, p. 362
can not perform other than judicial duties under some constitutions, sec. 55, p. 362
inhibition applies to state and not to municipal governments, sec. 55, p. 362
different powers often conferred on inferior tribunals and officers, sec. 55, p, 363
when judge may perform ministerial duties, sec. 55, p, 364
attempt to perform duties belonging to other department, acts void, sec. 55, p. 364
and act of legislature attempting to authorize such performance unconstitutional, sec. 55, p. 365
general powers and duties of judges, sec. 56
are judicial, sec. 56, p. 365
certain of must be performed by court, others by judges at chambers, sec. 56, p. 365
can not be delegated to others, sec. 56, p. 365
if imposed by constitution can not be relieved of by statute, sec. 56, p. 365
usually, but not always, cease with termination of office, sec. 56, p. 365
what acts may be done after term of office expires, sec. 56, p. 365
powers confined to territorial limits, sec. 56, p. 366
exceptions to this rule, sec. 56, p. 366
power to appoint officers and employes, sec. 56, p. 366
can not fix salary of court reporter, sec. 56, p. 366
power to act in another district, sec. 57, p. 366
generally limited to county or district over which court has jurisdiction, sec. 57, p. 366
but power to act elsewhere may be given by statute, when, sec. 57, p. 366
provision for frequently made, sec. 57, p. 366
held that as state officers may act in other districts without statutory authority, sec. 57, p. 367
but better rule the other way, sec. 57, p. 367
in some states provided for by constitution, sec. 57, p. 367
authority of federal judges in other districts, sec. 57, pp. 367, 368
when statutes authorizing judge to act in other county or district, valid, sec. 57, p. 369
where act must be done by court can not be done out of the territory where action pending, sec. 57, p. 370
exceptions to rule, sec. 57, p. 370

Jurisdiction—*Continued.*
two judges can not act at same time for same court, when, sec. 57, p. 370
when special and regular terms may be held at same time, sec. 57, p. 370
presumptions in favor of acts of judge from another district, sec. 57, p. 371
law providing for calling in non-resident judge must be complied with, sec. 57, p. 371
power to "hold court," what included in, sec. 57, p. 371
power of legislature to authorize under constitution giving such power, sec. 57, p. 371
performs all the duties of resident judge, when, sec. 57, p. 371
powers of resident judge suspended sec. 57, pp. 371, 372
by whom bill of exceptions settled, sec. 57, p. 372
where may be settled and signed, sec. 57, p. 372
can not act out of state, sec. 57, p. 372
authority at chambers, sec. 58
acts by courts must be done in term time, sec. 58, p. 372
exceptions by statutes, sec. 58, pp. 372, 373
such statutes exceptional and rare, sec. 58, p. 373
acts that may be done at chambers, usually provided by statute, sec. 58, p. 373
and in some cases held must be, sec. 58, p. 373
incidental to jurisdiction of the court, sec. 58, p. 373
and can be exercised only over matters of which court has jurisdiction, sec. 58, p. 373
powers given to court by constitution can not be vested in judge, by statute, sec. 58, p. 374
power established by long usage, sec. 58, p. 375
existed at common law, sec. 58, p. 375
and included in general grant of jurisdiction to court, sec. 58, p. 375
but usage not applicable to special powers granted by statute, sec. 58, p. 375
held power to "hold court" in another district does not authorize to act at chambers, sec. 58, p. 375
but usually judge called in has all powers of resident judge, sec. 58, pp. 375, 376
powers at chambers, as usually granted, enumerated, sec. 58, p. 376
can not issue injunction to operate beyond jurisdiction of court, sec. 58, p. 376
power independent of terms of court sec. 59, p. 376
authority in vacation, sec. 59
can not perform functions of court in vacation, sec. 59, p. 377
unless expressly authorized by statute and not forbidden by constitution, sec. 59, p. 377
entry of judgment ministerial act and may be performed in vacation, sec. 59, p. 377
court may be, by law, always in session for urgent business, sec. 59 p. 377
when "court" and "judge" are synonymous in granting power, sec. 59, p. 377
acts in vacation, when judicial acts of the court, sec. 59, p. 377
orders that may be made at chambers may be made in vacation, as a rule, sec. 59, p. 378
de jure and de facto judges, sec. 60
who is a *de facto* officer, sec. 60, pp. 379–383
color of title, when must be shown, sec. 60, pp. 380, 381

Jurisdiction—*Continued.*
and reputation of being an officer, sec. 60, p. 381
mere exercise of duties of office not enough, sec. 60, p. 382
must assume to act as judge, sec. 60, p. 382
attorney appointed to act as special not *de facto* judge, sec. 60, p 382
exception where irregularly appointed where appointment authorized, sec. 60, p. 382
can be no judge *de jure* or *de facto* if no court, sec. 60, p. 382
acts of *de facto* judge not invalid, sec. 33, p. 223; sec. 60, p. 383
nor subject to collateral attack, sec. 60, p. 383
but whether *de facto* judge or mere intruder may be questioned collaterally, sec. 60, p. 383
question of right to office must be raised by direct action for that purpose, sec. 60, p. 383
nature of such action, sec. 60, p. 383
mistake as to termination of office, action in good faith, effect of, sec. 60, pp. 383, 384
failure to comply with condition subsequent to election, as to give bond, effect of, sec. 60, p. 384
is rightful officer until right forfeited by direct action, sec. 60, p. 384
appointment under unconstitutional statute, effect of, sec. 60, p. 384
may be both *de jure* and *de facto* judge at same time, sec. 60, p. 385
but not two of either, sec. 60, p. 385
nor can a *de facto* and *de jure* judge be in actual possession of, or exercising duties of office at same time, sec. 60, p. 386
rule that upholds acts of *de facto* judge extends to all his duties, sec. 60, p. 386
special judges, sec. 61
who are, sec. 61, p. 387
power to appoint attorneys to act as, sec. 61, pp. 387, 388
how judge of another county or district may be called to act as, sec. 61, pp. 388, 389
when cause for must appear on face of record, sec. 61, p. 389
authority will be presumed, when, sec. 61, p. 389
recital in record showing necessary facts, effect of, sec. 61, p. 390
regular judge can not recuse himself and appoint special, when, sec. 61, p. 390
when and how objection to appointment may be made, sec. 61, p. 390
when objection obviated by new appointment, sec. 61, p. 391
same presumptions apply to proceedings of as to regular judges, sec. 61, p. 391
record showing regular appointment when conclusive, sec. 61, p. 391
attorney acting by consent, only, acts of void, sec. 61, p. 391
when appointment not in writing will be held insufficient, sec. 61, p. 391
effect of failure to appoint in writing on acts of, sec. 61, p. 391
are voidable only and not void, sec. 61, p. 391
failure to take oath of office, effect of, sec. 61, p. 392
prohibition when will lie to prevent action by, sec. 61, p. 392
failure of to appear and act, effect of, sec. 61, p. 392
extent of powers of attorney appointed as, controlled by statute, sec. 61, pp. 392, 393
when given all powers of regular judge may sign bill of exceptions after term of appointment, sec. 61, p. 393

Jurisdiction—*Continued.*
powers of judge called from another district limited by constitution and statutes, sec. 61, p. 393
may follow cause if transferred to another county, sec. 61, pp. 393, 394
special can not appoint another judge, sec. 61, p. 394
can not hold court while regular judge is sitting, sec. 61, p. 394
to try particular cause may retry same if reversed on appeal, sec. 61, p. 394
appointed for disqualification of regular judge may continue after another judge not disqualified takes the bench, sec. 61, pp. 394, 395
to try particular cause, what includes, sec. 61, p. 395
special judge who refuses may be compelled to act, sec. 61, p. 395
judges disqualified by interest or otherwise, sec. 62
may be wholly disqualified by, sec. 62, p. 395
disqualification can not be removed by consent, sec. 62, p. 395
what interest will disqualify, sec. 62, pp. 395–400
general interest as tax-payer, effect of, sec. 62, pp. 396, 397
bias or prejudice of judge, effect of, sec. 62, p. 396
compared with the interest that will disqualify a juror, sec. 62, p. 399
circumstances that will disqualify enumerated, sec. 62, p. 400
pecuniary interest in result,
having been of counsel,
consanguinity or affinity, bias or prejudice, sec. 62, p. 400
forbidden by law to act, his acts void, sec. 62, pp. 401, 402
and should be so if disqualified by interest, whether forbidden to act or not, sec. 62, p. 402
and whether objection is made by parties or not, sec. 62, pp. 402–408
held otherwise in some cases, sec. 62, p. 403
effect where one of several judges disqualified, sec. 62, p. 408
where transfer to another county is authorized on account of, judge must pass upon question of disqualification, sec. 62, p. 408
and if exists must order transfer, sec. 62, p. 408
to what extent not disqualified to act, sec. 62, p. 409
where failure to act will deprive parties of all remedy, sec. 62, p. 409
if persists in acting, how may be prevented, sec. 62, p. 410
when refuses to act, when not disqualified, how may be compelled to act, sec. 62, p. 411
not disqualified in appellate court because of having acted in lower court, sec. 62, p. 411
disqualified to hold the office, effect of, sec. 62, p. 412
bias and prejudice of the judge as affecting jurisdiction, sec. 63
is usually made ground for change of venue, sec. 63, p. 412
but not in some of the states, sec. 63, p. 412
may arise from causes which disqualify, sec. 63, p. 413
but is extended to causes not involving personal interest, sec. 63, p. 413
but as to the latter, may be waived by parties, sec. 63, p. 414
and if objection not made in time proceedings not void, sec. 63, p. 414
liability of judge acting without jurisdiction, sec. 64
wholly without jurisdiction, liable as trespasser, sec. 64, p. 414
but if has jurisdiction of subject-matter and person, not liable for acts in excess of jurisdiction, sec. 64, p. 414

Jurisdiction—*Continued.*
not liable for error of judgment, sec. 64, p. 414
even where result of lack of care or prudence, sec. 64, p. 414
or where done maliciously, sec. 64, p. 414
test of liability is that which distinguishes void from voidable or erroneous judgments or proceeding, sec. 64, p. 415
immunity where act is malicious does not extend to *quasi*-judicial officers, sec. 64, p. 415
and judge liable for conspiracy with others to prosecute through his court, sec. 64, p. 415
when must determine in advance whether has power to act, effect of erroneous decision, sec. 64, p. 416
when justice of the peace liable for issuing warrant for act not constituting public offense, sec. 64, p. 417
protection extends only to judicial acts, sec. 64, p. 417
in some cases confined to judges of superior courts, sec. 64, p. 417
but this distinction not warranted, sec. 64, pp. 417, 418
enough if judge has jurisdiction of general subject-matter, sec. 64, p. 418
exemption from liability is for public good, sec. 64, pp. 418, 419
judge deprived of jurisdiction, as by change of venue, liable if proceeds further, sec. 64, p. 419
common law, equity, and statutory jurisdiction, generally, sec. 65
can not be separated and treated independently, sec. 65, p. 420
have been intermingled by constitutions and statutes, sec. 65, p. 420
and rules of procedure changed and modified, sec. 65, p. 420
common law and equity jurisdiction do not exist independently of constitutions and statutes, sec. 65, pp. 420, 421
are given to courts by general provisions, sec. 65, p. 421
what general grant of common law jurisdiction includes, sec. 65, p. 421
includes criminal actions as well as civil cases, sec. 65, p. 421
grant of jurisdiction sometimes measured by "civil action" of codes, sec. 65, p. 421
and sometimes specifically defined without reference to common law or equity, sec. 65, p. 421
and remedies provided that could not have been administered by either, sec. 65, p. 421
in other states allowed to remain, but modified, enlarged, or limited, sec. 65, p. 421
substituted proceedings provided for assistant jurisdiction, sec. 65, p. 422
jurisdiction in all these cases is really statutory, sec. 65, p. 422
tendency of federal courts to broaden their equitable jurisdiction, sec. 65, p. 422
formerly common law and equity courts separate and independent, sec. 65, p. 422
but have now generally been consolidated into one, sec. 65, p. 422
and distinctions between common law and equity procedure abolished, sec. 65, p. 422
therefore question whether jurisdiction belongs to one or the other not so important, sec. 65, p. 422
but as affecting remedy distinction still exists, sec. 65, p. 422
in some states common law or parts of it adopted, sec. 65, p. 423
what will be presumed as to law in force in another state, sec. 65, p. 423

Jurisdiction—*Continued.*
where statute and common law conflict, statute prevails, sec. 65, p. 423
but if common law and equity jurisdiction given by constitution can not be taken away by statute, sec. 65, p. 423
otherwise may be controlled by statute, sec. 65, p. 423
presumed that was intention that common law should prevail, sec. 65, p. 424
federal courts have no common law jurisdiction except by virtue of constitution and statutes, sec. 65, p. 424
when cause of action given which did not exist at common law or in equity, held jurisdiction exceptional, sec. 65, pp. 425, 426
and party must bring himself within statute, sec. 65, p. 426
no apparent reason for distinction between statutory and other remedies in this respect, sec. 65, p. 426
constitutional jurisdiction, sec. 66
jurisdiction of superior courts generally fixed and defined by constitution, sec. 66, p. 426
generally done by conferring in all cases at law and in equity, sec. 66, p. 426
but sometimes specifically defined and limited, sec. 66, p. 426
the same as if conferred by statute, except can not be taken away by statute, sec. 66, p. 427
nor modified, limited, or extended, sec. 66, p. 427
power of legislature where jurisdiction given by constitution, sec. 66, p. 427
effect of grant of jurisdiction in "cases at law" or "common law jurisdiction," sec. 66, p. 427
what includes, sec. 66, p. 427
special proceedings and causes, what are, sec. 66, pp. 428, 429
distinction between, and action or civil action not warranted, sec. 66, pp. 428, 429
jurisdiction given by constitution but procedure not provided, court may provide, sec. 66, p. 431
power to issue writs given by constitution, objects of can not be changed by statute, sec. 66, p. 431
jurisdiction conferred by constitution not exclusive unless expressly made so, sec. 66, p. 431
and may be conferred concurrently on other courts by statute, sec. 66, p. 431
probate jurisdiction, sec. 67
formerly exercised by what courts, sec. 67, p. 431
in what court now in England, sec. 67, p. 431
in this country in what courts vested, sec. 67, p. 432
now regulated by constitutions and statutes, sec. 67, p. 432
broader than that exercised by ecclesiastical courts, sec. 67, p. 432
vested in courts of general jurisdiction, usually held to be separate and distinct, sec. 67, pp. 432, 433
no distinctively probate courts except in name, sec. 67, p. 433
standing of courts exercising, whether of superior or limited jurisdiction, sec. 67, pp. 433–435
generally held to be of limited, but not technically inferior, sec. 67, pp. 433, 434
presumptions in favor of proceedings of, sec. 67, p. 434
recital in record showing jurisdiction, effect of, sec. 67, pp. 434, 435
distinction between common law, equity, and statutory jurisdiction does not exist in reason, sec. 67, p. 435

Jurisdiction—*Continued.*
held in some cases to be inferior courts, sec. 67, p. 435
in others that proceedings not conclusive, sec. 67, p. 436
held to possess power to set aside judgments rendered by them, sec. 67, p. 436
cases turn upon language of constitutions and statutes as to standard of court, sec. 67, p. 437
incidental powers, whether courts possess or not, sec. 67, p. 437
authority to grant letters of administration sometimes granted to clerk of court, sec. 67, p. 437
but his acts in granting are ministerial, sec. 67, p. 437
and no presumption in favor of, sec. 67, p. 437
but letters granted by court conclusively presumed facts authorizing existed, sec. 67, p. 437
letters themselves conclusive evidence that were rightly issued as against collateral attack, sec. 67, p. 437
sometimes held to be *prima facie* evidence, sec. 67, p. 437
some states statutes make letters conclusive, sec. 67, pp. 437, 438
but such statutes declare the otherwise existing rule, sec. 67, p. 438
doctrine of conclusiveness extends to other proceedings, sec. 67, p. 438
but not when obtained by fraud, sec. 67, p. 438
and sometimes confined to final decrees or orders, sec. 67, p. 438
court, in final accounting, may correct mistake in prior proceedings, sec. 67, p. 438
decree settling final account and discharging executor conclusive until reversed, sec. 67, p. 438
grant of letters can not be avoided collaterally for incompetency of applicant, sec. 67, pp. 438, 439
grant of jurisdiction in "all probate matters," what included in, sec. 67, pp. 439–445
court of probate defined, sec. 67, p. 439
general statement of powers of, sec. 67, pp. 440, 441
does not extend to controversies between estate and third parties not claiming under estate, sec. 67, p. 440
or where right depends upon question over which has no jurisdiction, sec. 67, p. 441
when may pass upon question of title to real estate, sec. 67, p. 441
and as to ligitimacy of children, sec. 67, p. 441
may distribute to third party claiming under heir, sec. 67, p. 441
over wills, extent of jurisdiction, sec. 67, p. 442
when extends to validity and construction of, sec. 67, p. 442
estates of infants and persons of unsound mind, when have jurisdiction over, sec. 67, p. 442
formerly belonged to courts of chancery, sec. 67, p. 442
and in probate courts controlled by equity rules, sec. 67, pp. 442, 443
distinction between guardians appointed by court and testamentary guardians, sec. 67, p. 443
effect of existing testamentary guardianship over power to appoint, sec. 67, p. 443
appointment of guardian in another state does not affect, sec. 67, p. 443
of settlement of estates formerly in chancery, sec. 67, p. 443
how grew up, sec. 67, p. 443
in some states concurrent in chancery and probate courts, sec. 67, pp. 443, 444

Jurisdiction—*Continued*,
extent of jurisdiction of courts of chancery in such cases, sec. 67, p. 444
wholly denied in some cases where probate court exists, sec. 67, p. 444
other cases hold is a part of grant of general equity jurisdiction by constitution, and can not be made exclusive in probate court, sec. 67, p. 445
may interpose where probate court incapable of giving relief, sec. 67, p. 445
common law or equity jurisdiction may be conferred on probate courts, sec. 67, pp. 445, 446
cases to the contrary, sec. 67, p. 445
when construction of will peculiarly within chancery jurisdiction, sec. 67, pp. 446, 447
courts of equity no jurisdiction to order sale of legal title to real estate of infant, sec. 67, p. 447
when and to what extent probate court held to be court of equity, sec. 67, p 447
in some states have broad power to deal with trusts and matters of account, sec. 67, pp. 447, 448
but must arise in settlement of estates, sec. 67, p. 448
court of chancery no jurisdiction over purely probate matters as part of general equity powers, sec. 67, p. 448
formerly belonged in England to ecclesiastical courts, sec. 67, p. 448
and passes by general grant of probate jurisdiction, sec. 67, p. 448
grant of common law and equity jurisdiction does not include, sec. 67, pp. 448, 449
powers of equity and probate courts depend upon constitutions and statutes in different states, sec. 67, p. 449
difference in extent of powers in different states, sec. 67, pp. 449, 450
general equity jurisdiction in federal courts in settlement of estates can not be taken away or limited by state laws, sec. 67, p. 450
exclusive jurisdiction vested in probate court does not affect, sec. 67, p. 450
nor that property is being administered in state court, sec. 67, p. 450
nor can right to sue administrator or executor in, be taken away, sec. 67, p. 451
extent of jurisdiction of federal courts, sec. 67, p. 451
of probate depends upon—
death of owner of the estate,
and generally upon domicile of deceased at time of death,
or presence of property of deceased within jurisdiction, sec. 67, pp. 452, 453
whether property must have been within jurisdiction at time of death, sec. 67, p. 452
general rules as to place where proceedings must be commenced, sec. 67, pp. 452, 453
when court first assuming jurisdiction has exclusive, sec. 67, p. 453
death of owner of estate, finding of, by court does not give jurisdiction, sec. 67, p. 453
if owner not dead, proceedings void, sec. 67, p. 453

Jurisdiction—*Continued.*
as to domicil and presence of property, are questions of fact and finding conclusive, sec. 67, p. 453
but held otherwise in some states, sec. 67, pp. 453, 454
when letters revoked on direct attack, sec. 67, p. 454
jurisdictional facts found, not void, sec. 67, p. 454
letters granted by interested judge void, sec. 67, p. 454
what petition in probate proceeding must show as to jurisdictional facts, sec. 67, p. 454
distinction made between superior and inferior courts in this respect, sec. 67, p. 454
effect where statute provides failure to allege shall not be taken advantage of except on appeal, sec. 67, pp. 454, 455
finding that applicant for letters has necessary qualifications conclusive, sec. 67, p. 455
letters granted to stranger before time limited for application by relatives held void, sec. 67, p. 455
court granting letters, jurisdiction of, not necessarily exclusive as to all matters connected with estate, sec. 67, p. 455
petition for sale of real estate may be filed in court of other county, when, sec. 67, p. 455
contest of will, necessity of alleging jurisdictional facts, sec. 67, pp. 455, 456
proof of facts obviate failure to allege, sec. 67, p. 456
letters on same estate may be granted in different states, sec. 67, p. 456
powers of respective administrators, sec. 67, p. 456
grant of letters of administration where will exists, how may be attacked, sec. 67, p. 456
letters granted in one state have no force in another, sec. 67, p. 456
power of administrator to sue in another state, sec. 67, p. 456
probate of will conclusive in state where granted, sec. 67, p. 457
is proceeding *in rem* and binds all the world,sec. 67, p. 457
rule as to conclusiveness at common law, sec. 67, p. 457
probate not proof of execution of will according to laws of another state, sec. 67, p. 457
proves validity only so far as affects property within state, sec. 67, p. 457
whether probate court may vacate its own order of probate, sec. 67, pp. 457, 458
generally held it may, sec. 67, p. 458
power to revoke incidental to jurisdiction to grant letters, sec. 67, p. 458
when court of chancery may set aside judgment of probate court, sec. 67, p. 458
power of chancery to set up lost, destroyed, or suppressed will, sec. 67, p. 458
power generally denied on ground is strictly probate jurisdiction, sec. 67, p. 458
contest of wills, extent of jurisdiction in case of, sec. 67, p. 459
only question will or no will, court can not construe, sec. 67, p. 459
notice to heirs and parties interested necessary, sec. 67, p. 459
will can not be granted before death of testator, sec. 67, p. 459
no law authorizing probate at time of death can not be probated under subsequent statute, when, sec. 67, p. 459

Jurisdiction—*Continued.*
probate of will not necessary to validity of, unless made so by statute, sec. 67, pp. 459, 460
general rule finding of notice conclusive, sec. 67, p. 460
power to appoint guardians usually confined to minors, etc., residing within jurisdiction, sec. 67, p. 460
but may be extended by law to non-residents, sec. 67, p. 460
order final distribution terminates jurisdiction, sec. 67, p 460
and is conclusive against collateral attack, sec. 67, p. 460
probate within county, but not at county seat, not void, sec. 67, p. 460
general rules as to necessity of notice applies to probate proceedings, sec. 67, p. 460
necessary, though not required by statute authorizing proceeding, sec. 67, p. 460
special cases and proceedings, sec. 68
what are, sec. 68, p. 461
courts have not been able to define, sec. 68, p. 462
or find dividing line between and ordinary actions, sec. 68, pp. 462, 463
no reason for distinction between and actions, sec. 68, pp. 461, 462, 463
question important because court exercising jurisdiction over special cases held to be inferior, sec. 68, p. 463
probate proceedings classed as special in some codes, sec. 68, p. 463
but probate courts usually held not to be inferior, sec. 68, p. 463
strictness necessary in complying with statutory requirements, sec. 68, p. 464
no reason for distinction between and common law proceedings in this respect, sec. 68, p. 464
and rule of strict compliance usually confined to summary proceedings, sec. 68, p. 464
finding of facts to give jurisdiction conclusive, sec. 68, p. 464
petition filed what must show to give jurisdiction, sec. 68, p. 465
rule with reference to special proceedings generally same as in case of inferior courts, sec. 68, p. 465
what are made special by the codes, sec. 68, p. 465
courts hold many of them not to be special, sec. 68, p. 465
cases held not to be enumerated, sec. 68, p. 466
classed as in code does not make case special, sec. 68, p. 467
proceedings held to be special enumerated, sec. 68, pp. 467, 468
proceedings by executors, etc., to sell real estate, how classed, sec. 68, p. 468
presumptions in favor of, sec. 68, p. 468
power given legislature to confer jurisdiction in special cases, effect of, sec. 68, pp. 468, 469
what "special cases" held to include, sec. 68, p. 469
and "special proceedings," sec. 68, p. 469
statute giving jurisdiction of "all special cases not otherwise provided for," effect of, sec. 68, p. 469
criminal jurisdiction, sec. 69
controlled by express statutory and constitutional provisions, sec. 69, p. 469
distinction between civil and criminal as to what gives jurisdiction, sec. 69, p. 470
place where crime committed determines, sec. 69, p. 470

Jurisdiction—*Continued.*
party in one state may commit crime in another, sec. 69, p. 470
therefore party need not be in state where committed to give jurisdiction, sec. 69, p. 470
accessory before fact in another state can not be punished in state where crime committed, sec. 69, p. 470
answerable in state where he acted, sec. 69, p. 470
jurisdiction is where crime was completed, sec. 69, p. 470
and not where some act constituting part of it was committed, sec. 69, p. 470
different rule under statutes in some states, sec. 69, p. 471
absence of statute jurisdiction where crime consummated, sec. 69, p. 471
states may pass laws making its citizens liable for acts done out of state, sec. 69, p. 471
proceedings for apprehending criminal out of state jurisdiction ancillary to that of courts where offense committed, sec. 69, p. 471
how such jurisdiction brought into action, sec. 69, p. 471
statute authorizing must be strictly pursued, sec. 69, p. 471
jurisdiction of state courts over offenses committed by Indians, sec. 69, p. 471
means by which defendant is brought into state does not affect jurisdiction to try him, sec. 69, p. 472
legality of extradition proceedings does not affect, sec. 69, p. 472
but treaties may limit jurisdiction, sec. 69, p. 472
extradited for one crime can not be tried for another, sec. 69, p. 472
extradition from foreign country must be through federal government, sec. 69, p. 472
federal court may protect accused from trial in state court, when, sec. 69, p. 472
brought to this country by force and not by virtue of treaty, federal courts can not interfere with trial in state court, sec. 69, p. 472
accused must be before court, service of process not sufficient, sec. 69, p. 473
actual presence sometimes dispensed with by statute, sec. 69, p. 473
place where offense committed must be alleged in indictment, sec. 69, p. 473
and where jurisdiction of court extends over part of county, must allege committed in that part, sec. 69, p. 473
otherwise sometimes by statute, sec. 69, p. 473
whether offense committed within jurisdiction question of fact for jury, sec. 69, p. 473
controverted by plea of not guilty, sec. 69, p. 473
and burden on prosecution, sec. 69, p. 473
finding of facts necessary to give jurisdiction conclusive on collateral attack, sec. 69, p. 473
but proof of venue necessary to sustain on appeal, sec. 69, pp. 473, 474
how question of may be raised, sec. 69, p. 474
where court gives jurisdiction after designated time, effect of taking before time expires, sec. 69, p. 474
when authorized to issue warrant on evidence of guilt, effect of issuing without, sec. 69, p. 475
affidavit expressing opinion not sufficient evidence, sec. 69, p. 475

Jurisdiction—*Continued.*
exceptions to rule that must be tried in county where offense committed, sec. 69, p. 475
crime of larceny and like offenses where property stolen, or in county where property found, sec. 69, p. 475
so where property brought from another state, sec. 69, p. 475
and where offense committed partly in different counties, sec. 69, p. 475
murder, usually where fatal blow was struck, although death occurred elsewhere, sec. 69, p. 475
statutes authorizing constitutional, sec. 69, pp. 475, 471
so of statute authorizing trial where death occurred, wound inflicted on high seas, sec. 69, p. 476
property taken into county may be alleged to have been stolen there, sec. 69, p. 476
asportation from one county to another new theft, sec. 69, p. 476
different rule in charge of burglary, which is local crime, sec. 69, p. 476
held legislature can not authorize prosecution of burglary in another county, sec. 69, p. 476
effect of statute authorizing prosecution in county where acts or *effects* of acts occur, sec. 69, p. 477
statute authorizing prosecution of offense committed in another state held void, sec. 69, p. 477
but authorities disagree, sec. 69, p. 477
wound inflicted in one state and death in another, where jurisdiction rests, sec. 69, p. 477
law requiring trial in county where crime committed rests upon right to jury of the neighborhood, sec. 69, p. 478
subject to right to change of venue, sec. 69, p. 478
right to trial by jury of county can not be taken away by statute, sec. 69, p. 478
statute authorizing change of venue by district attorney without defendant's consent unconstitutional, sec. 69, p. 478
change of venue, how court obtains jurisdiction, sec. 69, p. 479
when court from which removed loses jurisdiction, sec. 69, p. 479
criminal action is one at law, sec. 69, p. 479
and grant of jurisdiction in cases at law confers jurisdiction of, sec. 69, p. 479
given by constitution can not be taken away by statute, sec. 69, p. 479
but if not made exclusive, concurrent may be given another court, sec. 69, p. 479
effect of constitution conferring on new courts where jurisdiction of other courts already existing, sec. 69, p. 480
jurisdiction over offense charged may convict of lesser offense within, sec. 69, p. 480
effect of exceeding jurisdiction in fixing punishment, sec. 69, p. 481
same act may constitute offense against state and federal government and be punishable by courts of both, sec. 69, p. 481
appeal confers no jurisdiction where lower court had none, sec. 69, p. 481
how prosecutions for crime may be commenced, sec. 69, pp. 481, 482
not necessarily by indictment, sec. 69, p. 481
depends upon provisions of constitution, sec. 69, p. 481
when examination before magistrate provided for, such examination necessary, sec. 69, p. 482

Jurisdiction—*Continued.*
held if committed for one offense, district attorney may file information for another, sec. 69, p. 482
but correctness of the rule doubted, sec. 69, p. 482
held, also magistrate may commit for other offense than one charged, sec. 69, p. 482
where accused may elect in which court he will be tried, his election gives exclusive jurisdiction, sec. 69, p. 483
demand for jury may deprive court of jurisdiction, when, sec. 69, p. 483
where jurisdiction depends upon whether offense "high and aggravated," indictment must charge the fact, sec. 69, p. 483
maritime jurisdiction, sec. 70
generally belongs exclusively to federal courts, sec. 70, p. 483
but state courts not wholly without, sec. 70, p. 483
but not strictly speaking admiralty jurisdiction, sec. 70, p. 484
confined to interior navigation, where no interstate or foreign commerce, sec. 70, p. 484
over such navigation federal courts have no jurisdiction, sec. 70, p. 484
claims against vessels not maritime within jurisdiction of state courts, sec. 70, p. 484
liens provided by state laws when enforcible in federal courts, sec. 70, p. 484
when enforceable in state courts, sec. 70, p. 484
depends upon character of contract, sec. 70, p. 484
when discretionary with federal court whether to enforce or not, sec. 70, p. 485
in regulation of commerce congress may provide for liens, sec. 70, p. 485
but if does not, states may, sec. 70, p. 485
when states may regulate fisheries, sec. 70, p. 485
states can not by providing for liens extend jurisdiction of federal courts, sec. 70, p. 485
nor can courts decline to enforce because provided for by state, sec. 70, p. 485
may enforce state lien on domestic vessel, though maritime law would only give on foreign vessel, sec. 70, p. 485
but state courts can not enforce lien on vessel engaged in foreign commerce, sec. 70, p. 485
but may against vessels navigating inferior streams and not engaged in foreign or interstate commerce, sec. 70, p. 486
general rule that admiralty jurisdiction confined to tide waters to the ebb and flow, sec. 70, p. 486
but federal courts extend to navigable lakes and rivers above tides where commerce carried on between different states or with foreign nation, sec. 70, p. 486
common-law remedy growing out of maritime transaction may be administered by state court, sec. 70, p. 486
fact that common-law remedy aided by lien does not affect jurisdiction, sec. 70, pp. 486, 487
impeachment, sec. 71
jurisdiction of, usually vested in political body, sec. 70, p. 487
of federal officer in whom power vested, sec. 71, p. 487
senate acquires jurisdiction, how, sec. 71, p. 487
impeachment of officer does not affect jurisdiction of courts to try him for same offense, sec. 71, p. 487
jurisdiction of impeachment of state officers, sec. 71, p. 488

Jurisdiction—*Continued.*
contempts, sec. 72
jurisdiction in cases of, does not depend upon express law, sec. 72, p. 488
is a part of inherent powers of courts, sec. 72, p. 488
can not be taken away by legislature, sec. 72, p. 488
rule applies to constructive contempts, sec. 72, p. 489
but legislature may limit and control, sec. 72, p. 490
power usually given and provided for by statute, sec. 72, p. 490
power not confined to courts, sec. 72, p. 490
to what extent legislative bodies may exercise, sec. 72, pp. 490, 491
as respects the congress of the United States, sec. 72, p. 491
jurisdiction depends on character of contempt, sec. 72, p. 491
may be contempt at common law or made so by statute, sec. 72, p. 492
civil contempts, what are, sec. 72, p. 492
do not authorize imprisonment for debt, sec. 72, p. 492
imprisonment until debt paid is one for debt and unlawful, sec. 72, p. 492
no showing or affidavit necessary in direct contempt, sec. 72, p. 492
court may proceed summarily on its own knowledge, sec. 72, p. 492
in case of constructive, affidavit generally required, sec. 72, p. 492
court no jurisdiction to act without, sec. 72, p. 492
must allege facts constituting contempt, sec. 72, p. 493
return of officer sometimes sufficient without affidavit, sec. 72, p. 493
but *prima facie* case must be so made as to constitute part of record, sec. 72, p. 493
affidavit on information and belief, judgment not void, sec. 72, p. 493
held, jurisdiction does not depend on form of affidavit, sec. 72, p. 493
but not in accordance with rule requiring affidavit, sec. 72, p. 493
effect of judgment, whether conclusive and final or not, sec. 72, p. 493
better rule is that is open to review on appeal, sec. 72, pp. 493, 494
jurisdiction of court or general power to punish for, always open to inquiry, sec. 72, p. 494
whether facts in particular case constitute contempt, held not judicial question, sec. 72, p. 495
but cases conflicting, sec. 72, p. 495
when accused will be discharged on *habeas corpus*, sec. 72, p. 495
legislative bodies acts not conclusive, sec. 72, p. 493
because not courts, sec. 72, pp. 495–496
power to punish own members exclusive and not subject to review sec. 72, p. 496
extends to other persons, when, sec. 72, p. 496
as to other persons, power not granted to congress, sec. 72, p. 496
committed in presence of court, notice not necessary, sec. 72, p. 496
but opportunity to explain must be given, sec. 72, p. 496
facts recited in commitment conclusive on collateral attack, sec. 72, p. 496
when existence of jurisdictional facts presumed, sec 72, p. 496
finding of facts by court conclusive, sec. 72, pp. 496, 497
out of presence of court notice necessary, sec. 72, p. 497
what notice required, sec. 72, p. 497

Jurisdiction—*Continued.*
requirements of statute may be waived, sec. 72, p. 497
what are jurisdictional facts, sec. 72, p. 498
fact that may be prosecuted by indictment does not affect jurisdiction, sec. 72, p. 498
is exclusive in court against which offense committed, sec. 72, p. 498
sole power of federal courts derived from statutes, sec. 72, p. 499
would not be so if statute did not cover all inherent powers, sec. 72, p. 499
but statute effective to limit power, sec. 72, p. 499
whether power of United States supreme court can be limited by statute, sec. 72, p. 499
rule as to territorial courts, sec. 72, p. 499
and as to inferior courts, sec. 72, pp. 499, 500
except as to legislative bodies, power confined to judges and courts, sec. 72, p. 500
when town council has power, sec. 72, p. 501
as to the power of notaries public, sec. 72, p. 501
powers of courts greatly extended, sec. 72, p. 501
that court has jurisdiction of cause does not give it of contempt, sec. 72, p. 502
depends upon showing in contempt proceeding, sec. 72, p. 502
distinction between civil and criminal contempts, sec. 72, p. 502
court having law and equity side, how contempt proceeding docketed, sec. 72, p. 502
sometimes held part of original case, sec. 72, p. 503
no jurisdiction to make order, none to punish for violating it, sec. 72, p. 503
failure to attend as witness before notary, how punished, sec. 72, p. 503
power to strike out pleading, what must be shown, sec. 72, p. 504
where offense in presence of court must proceed without delay, sec. 72, p. 504
final judgment terminates jurisdiction, sec. 72, p. 504
divorce, sec. 73
power to grant to whom belongs, sec. 73, p. 504
is judicial power and belongs to courts, sec. 73, p. 504
special statute authorizing, when unconstitutional, sec. 73, p. 504
formerly vested in ecclesiastical courts, sec. 73, p. 505
but now in supreme court, sec. 73, p. 505
in this country given to different courts, sec. 73, p. 505
how exercised in this country, sec. 73, p, 505
is wholly statutory, sec. 73, p. 505
grant of common law and equity jurisdiction does not confer, sec. 73, p. 505
cases holding that jurisdiction is equitable, sec. 73, p. 506
but not so as to granting of divorces, sec. 73, p. 506
matters connected with are, sec. 73, p. 506
action for, civil action under codes, sec. 73, p. 506
and grant of jurisdiction in "civil cases both at law and in equity" confers, sec. 73, p. 506
what included in jurisdiction, sec. 73, p. 506
granting divorces,
allowance of alimony,
property rights,
custody and maintenance of children, sec. 73, p. 506
three latter incidental to granting divorces, sec. 73, p. 506

Jurisdiction—*Continued.*
but not necessarily dependent upon it, sec. 73, p. 506
not so in all of the states, sec. 73, p. 506
to authorize disposition of property, issue as to must be raised by pleadings, sec. 73, p. 507
means of acquiring jurisdiction over divorce, and of incidental matters, different, sec. 73, p. 507
power to grant divorce affects *status*, and is not personal action, sec. 73, p. 507
same as action *in rem*, although erroneously held to be action on contract, sec. 73, p. 507
personal service not necessary, sec. 73, p. 507
but otherwise as to alimony, sec. 73, p. 507
for alimony, can not be rendered against non-resident on constructive service, sec. 73, p. 507
but state may authorize against its own citizens, sec. 73, pp. 507, 508
law of domicil controls as to jurisdiction, sec. 73, p. 508
when and why decrees respected in other states, sec. 73, p. 508
not universally respected, sec. 73, p. 509
some states hold decree on constructive service a nullity, sec. 73, p. 509
extent of power to grant in different states, sec. 73, pp. 509, 510
when held not to have extraterritorial effect, sec. 73, pp. 509–511
how far decree affects property out of state, sec. 73, p. 511
doctrine that decree binding as to one party and not the other, anomalous, sec. 73, p. 512
decree for custody of children same as for divorce, as to validity, sec. 73, p. 512
only binding while children within state, sec. 73, p. 512
domicil of wife not domicil of husband for purposes of, sec. 73, p. 512
actual residence controls, sec. 73, p. 512
neither party resident of state, decree void, sec. 73, p. 512
generally, residence of plaintiff gives jurisdiction, sec. 73, pp. 512, 513
wife may acquire residence distinct from husband, sec. 73, p. 513
must be actual residence, sec. 73, p. 513
non-resident can not sue though defendant a resident, sec. 73, p. 513
residence must be *bona fide*, sec. 73, p. 514
what will constitute sufficient residence, sec. 73, p. 514
allegation and proof of, necessary, sec. 73, p. 514
admission of party will not supply, sec. 73, p. 514
how jurisdictional facts must appear, sec. 73, p. 514
question of residence one of fact, sec. 73, p. 514
finding of *prima facie* evidence against collateral attack, sec. 73, p. 514
whether conclusive or not authorities not agreed, sec. 73, p. 515
decrees sometimes held to be final on grounds of public policy, sec. 73, p. 515
on grounds of public policy, no appeal allowed in some states, sec. 73, p. 515
finding as to residence will not be inquired into collaterally, sec. 73, p. 515
decree rendered against non-resident on constructive notice may be attacked for fraud, sec 73, p. 515

Jurisdiction—*Continued.*
in some states residence not only test of jurisdiction, sec. 73, p. 516
place of commission of offense is one, sec. 73, p. 516
and parties must in some states have lived together within the state, sec. 73, p. 516
federal courts have no jurisdiction of, within the states, sec. 37, p. 516
but may enforce decree of state court for alimony, sec. 73, p. 516
orders for alimony or for custody of children subject to modification, sec. 73, p. 516
even after final decree and after term, sec. 73, p. 516
petition for alimony, when no notice necessary, sec. 73, pp. 516, 517
power to grant or modify order for, not suspended by appeal, sec. 73, p. 517
question of jurisdiction as affected by sufficiency of affidavit for publication, sec. 73, p. 517
presumed that sufficient affidavit made, when, sec. 73, p. 517
recitals in record presumed to be correct, sec. 73, p. 517
when affidavit can not be made until after return day of summons, sec. 73, p. 517
defective service waived by appearance, sec. 73, p. 518
what required in addition to publication, sec. 73, p. 518
personal service necessary against resident defendant, sec. 73, p. 518
attachment, sec. 74
defined, sec. 74, p. 518
not a common law remedy, sec. 74, p. 518
originated in custom of foreign attachment in London, sec. 74, p. 518
at present day remedy entirely statutory, sec. 74, p. 518
in nature of but not strictly proceeding *in rem*, sec. 74, p. 518
seizure of property alone not sufficient to authorize court to proceed, sec. 74, p. 518
notice also necessary, sec. 74, p. 518
in this differs from custom of London, sec. 74, p. 519
no part of equity powers of court of chancery, sec. 74, p. 519
but conferred upon such courts by statute, sec. 74, p. 519
remedy is incidental to recovery of judgment in main action, sec. 74, p. 519
is denominated a provisional remedy, sec. 74, p. 519
if main action fails attachment falls, sec. 74, p. 519
where defendant non-resident, not personally served, attachment fails, whole case at an end, sec. 74, p. 519
defendant non-resident, and constructive service, proceeding one *in rem*, sec. 74, p. 519
and property attached alone subject to judgment, sec. 74, p. 519
in such case attachment upholds main action, sec. 74, p. 520
attachment proceeding, how far independent of main action, sec. 74, p. 520
non-resident creditor may have attachment, sec. 74, p. 520
proceeding extraordinary and limited by statute, sec. 74, p. 520
and confined strictly within limits by courts, sec. 74, p. 520
how strictly statutes must be complied with, sec. 74, p. 520
requirements differ in different states, sec. 74, p. 520
when may issue, sec. 74, pp. 521, 523
general grounds and showing upon which allowed, sec. 74, pp. 520, 521

Jurisdiction—*Continued.*
1. *an action in which an attachment is allowed must be commenced and pending*, sec. 74, p. 521
what kinds of actions may be aided by, sec. 74, p. 522
generally confined to actions on contract, sec. 74, p. 522
includes actions for unliquidated damages, sec. 74, p. 522
but not so in some states, sec. 74, p. 522
sometimes where debt was fraudulently contracted, sec. 74, p. 522
and for damages for torts in some states, sec. 74, p. 523
what is action on contract, sec. 74, p. 523
commencement before time allowed, effect of, sec. 74, p. 523
2. *grounds upon which may issue, and affidavit necessary to sustain*, sec. 74, p. 523
grounds of, generally, sec. 74, pp. 523, 524
what affidavit must show, and how stated, sec. 74, pp. 524, 525
affidavit is foundation and support of jurisdiction, sec. 74, p. 526
failure to state essential fact, proceeding void, sec. 74, p. 526
but in some states amendments allowed, sec. 74, p. 526
defect in, distinguished from failure to make, sec. 74, p. 526
complaint and affidavit may be combined, when, sec. 74, p. 526
same affidavit may serve for attachment and publication, sec. 74, p. 527
whether seizure of property without notice gives jurisdiction, sec. 74, pp. 527, 528
what proceedings are jurisdictional, sec. 74, p. 528
different parts and elements of affidavit—
a. *by whom may be made*, sec. 74, pp. 528, 529
statutes differ, sec. 74, p. 528
under some, must be made by plaintiff, sec. 74, p. 528
others may be by attorney or agent, see. 74, p. 528
attorney must be authorized as such at time, sec. 74, p. 528
subsequent ratification insufficient, sec. 74, p. 528
under some statutes may be made by any credible person, sec. 74, p 529
b. *averment of cause of action and amount due*, sec. 74, pp. 529, 530
must show cause of action in which attachment allowed, sec. 74, p. 529
amount due must be alleged, sec. 74, p. 529
how amount due may be shown, sec. 74, p. 529
variance between complaint and affidavit as to amount due, effect of, sec. 74, p. 529
contract sued on need not show amount due on face, sec. 74, p. 529
but must be such that amount can be ascertained, sec. 74, p. 529
where parties may be sued jointly, but liable separately, for different amounts, amount due from each must be shown, sec. 74, pp, 529, 530
where required to show amount due over counterclaim, necessary averments, sec. 74, p. 530
c. *presence of property within jurisdiction of court*, sec. 74, pp. 530, 531
affidavit must show in some of the states, sec. 74, p. 530
not making of affidavit, but actual presence of property, that gives jurisdiction, sec. 74, p. 530
therefore fact if alleged may be controverted, sec. 74, p. 530

Jurisdiction—*Continued.*
allegation not always required, sec. 74, p. 530
but fact must exist, when, sec. 74, pp. 530, 531
d. *non-residence of the defendant*, sec. 74, p. 431
necessary to be shown in some states, sec. 74, p. 531
against joint debtors must show as to both, sec. 74, p. 531
e. *absconding debtors*, sec. 74, p. 531
concealment ground of attachment, sec. 74, p. 531
f. *fraudulent disposition or removal of property*, sec, 74, p. 531
usually allowed to be made on information and belief, sec. 74, p. 531
but grounds of belief sometimes required to be stated, sec. 74, p. 531
question one of fact to be determined on hearing, sec. 74, p. 531
must appear property subject to execution, when, sec. 74, pp 531, 532
whether necessary to aver or not, property must in fact be subject to execution, sec. 74, p. 532
g. *concealment to avoid service of process*, sec. 74, p. 532
intention material, sec. 74, p. 532
therefore must show concealment with intent to avoid service, sec. 74, p. 532
but intent held not material in some states, sec. 74, p. 532
h. *debt fraudulently incurred*, sec. 74, p. 532
fraud must relate to time of making contract, sec. 74, p. 532
and must have been perpetrated with intent to procure it, sec. 74, p. 532
what constitutes such fraud, sec. 74, p. 532
can not be maintained for several claims, part not fraudulent, sec. 74, p. 533
showing of negligence not sufficient, sec. 74, p. 533
but of embezzlement is, sec. 74, p. 533
i. *obligations criminally incurred*, sec. 74, p. 533
by commission of a crime is, sec. 74, p. 533
j. *where claim sued upon is not due*, sec. 74, p. 533
only allowed on showing that property about to be disposed of or removed, sec. 74, p, 533
specific grounds must be shown by affidavit, sec. 74, p. 533
non-residence alone not sufficient, sec. 74, p. 533
order of court authorizing issuance of writ, when necessary, sec. 74, p. 533
issued by clerk, without order, void, sec. 74, p. 533
k. *sources of information as to facts averred*, sec. 74, p. 533
when facts and circumstances showing knowledge must be stated, sec. 74, p. 534
l. *additional averments when made by attorney or agent*, sec. 74, p. 534
absence of plaintiff, sec. 74, p. 534
must be sustained by proof, sec. 74, p. 534
must show knowledge of facts, sec. 74, p. 534
3. *the bond or undertaking*, sec. 74, p. 534
giving of, necessary to uphold attachment, sec. 74, p. 534
but not required in all cases, sec 74, p. 534
failure to give held irregularity merely, sec. 74, p. 535
and does not affect jurisdiction, sec. 74, p. 535
held otherwise in some states, sec. 74, p. 535
by whom must be executed, sec. 74, p. 535

Jurisdiction—*Continued.*
must comply with statute, sec. 74, p. 535
4. *the writ of attachment*, sec. 74, p. 535
in order to apply jurisdiction to particular property must issue, sec. 74, p. 535
generally issued as of course by clerk, sec. 74, p. 536
when must issue, sec. 74, p. 536
what must contain, sec. 74, p. 536
statutes as to what shall contain mandatory, sec. 74, p. 536
can not, without statutory authority, be amended, sec. 74, p. 536
5. *levy of writ and proof of its service*, sec. 74, p. 536
levy of, necessary to attach jurisdiction to property, sec. 74, pp. 536, 537
from that time property made subject to judgment, if rendered, sec. 74, p. 536
levy vests jurisdiction of subject-matter, sec. 74, p. 537
held in some cases question of levy not jurisdictional, sec. 74, p. 537
return of officer on, what must show, sec. 74, p. 537
where no personal service, jurisdiction limited to property levied on, sec. 74, p. 537
possession must be maintained, sec. 74, p. 537
levy and notice to non-resident both necessary, sec. 74, pp. 537, 538
when writ must be served, sec. 74, p. 538
time for service limited, effect of concealment of defendant, sec. 74, p. 538
no personal service, conditions subsequent to levy jurisdictional, sec. 74, p. 538
failure to comply with renders judgment by default void, sec. 74, p. 538
6. *service of process on defendant*, sec. 74, p. 538
necessary to authorize judgment and disposition of property, sec. 74, p. 538
personal service on resident defendant generally required, sec. 74, p. 539
certain time given to obtain personal service, constructive before, void, sec. 74, p. 539
federal courts, on foreign attachment personal service necessary, sec. 74, p. 539
non-resident, constructive service authorized, sec. 74, p. 539
how constructive notice given, sec. 74, p. 539
if time for service limited by statute, service after, void, sec. 74, p. 539
difference in effect of personal and constructive service, sec. 74, p. 539
no personal judgment on constructive, sec. 74, pp. 539, 540
only authorized sale of property attached, sec. 74, p. 540
failure to give notice, effect of, sec. 74, p. 540
discrepancy in decisions of federal and state courts as to necessity of notice, sec. 74, p. 540
effect of insufficient notice, sec. 74, p. 540
difference between no service and defective service, sec. 74, p. 541
writ of attachment as summons, effect of quashing, sec. 74, p. 541
when personal service of writ of attachment necessary, sec. 74, p. 541

Jurisdiction—*Continued.*
failure to serve summons in time, effect on attachment, sec. 74, p. 541
7. *proof of service of process*, sec. 74, p. 541
jurisdiction over does not depend upon, but upon service, sec. 74, p. 541
how proof must be made, sec. 74, p. 541
8. *waiver of defects in proceedings*, sec. 74, p. 542
appearance waived, sec. 74, p. 542
objecting on certain grounds, others waived, sec. 74, p. 542
appearance in main action, effect on attachment, sec. 74, pp. 542, 543
giving delivery bond, effect of as waiver, sec. 74, p. 544
and agreement that property may be sold, sec. 74, p. 544
special appearance, effect of, sec. 74, p. 544
9. *amendments*, sec. 74, p. 544
of attachment proceedings, including affidavit authorized by statute, sec. 74, p. 544
what amendments allowed, sec. 74, p. 544
filing of new affidavit or bond permitted, sec. 74, p. 544
federal courts liberal in allowing, sec. 74, p. 544
must be something to amend, sec. 74, pp. 544, 545
void affidavit can not be amended, sec. 74, p. 545
can not add new cause of attachment, sec. 74, p. 545
return of officer may be amended, sec. 74, p. 545
10. *how sufficiency of proceedings may be tested*, sec. 74, p. 545
different modes of testing, sec. 74, pp. 545, 546
objection must be made before final judgment, sec. 74, p. 546
reason for the rule, sec. 74, p. 546
time of motion to set aside sometimes limited by statute, sec. 74, p. 547
11. *presumptions in favor of jurisdiction in attachment*, sec. 74, p. 547
garnishment, sec. 75, p. 547
principles affecting similar to attachment, sec. 75, p. 547
object of proceeding, sec. 75, p. 547
differs from attachment in that seizure of property not necessary, sec. 75, pp. 547, 548
is ancillary to main action, sec. 75, p. 548
in what respects same as attachment as to what necessary to uphold it, sec. 75, p. 548
jurisdiction may rest upon garnishment proceeding, sec. 75, p. 548
question of debt between garnishee and defendant treated as independent, sec. 75, p. 549
as to affidavit general principles same as an attachment, sec. 75, p. 549
same as to bond, sec. 75, p. 549
who may object to sufficiency of bond, sec. 75, p. 549
as to necessity of notice in main action, sec. 75, p. 550
in lieu of seizure of property notice to garnishee required, sec. 75, p. 550
notice in nature of actual levy, sec. 75, p. 550
how garnishee bound by notice, sec. 75, p. 550
from time of notice property in custody of court, sec. 75, p. 550
may be in form of summons, sec. 75, p. 550
how doctrine of waiver of notice differs from rule in attachment, sec. 75, p. 550

Jurisdiction—*Continued.*
garnishee not a party and can not waive notice, sec. 75, pp. 550, 551
nor the making of affidavit, sec. 75, p. 551
may waive defects affecting himself, sec. 75, p. 551
how far defendant may waive notice or defects, sec. 75, p. 551
nothing peculiar about proof of service, sec. 75, p. 551
jurisdiction as to amount what controls, sec. 75, p. 551
where proceeding must be brought, sec. 75, pp. 551, 552
against foreign corporations, sec. 75, pp. 551, 552
non-resident garnishee not subject to constructive notice, sec. 75, p. 552
non-residence of defendant immaterial if property found in hands of garnishee, sec. 75, p. 552
must be property within jurisdiction subject to execution, sec. 75, p. 552
on what cause of action garnishment will lie, sec. 75, p. 553
how far garnishee interested in question of jurisdiction, sec. 75, p. 553
how far may question judgment in main action, sec. 75, p. 553
sales of real estate, sec. 76, p. 554
confusion in decided cases and causes therefor, sec. 76, p. 554
whether courts exercising jurisdiction over, are superior or inferior, sec. 76, pp. 554, 555
presumptions, how far proceedings for upheld by, sec. 76, pp. 554, 555
how facts necessary to uphold may be shown, sec. 76, p. 555
upon what the jurisdiction depends, sec. 76, pp. 555, 556
whether legality of appointment of administrator or guardian can be attacked colleterally in, sec. 76, p. 556
rule that it can not, sustained by weight of authority, sec. 76, p. 556
record showing want of jurisdiction to appoint, effect of, sec. 76, p. 556
record-silent jurisdiction to appoint presumed, sec. 76, p. 557
where question goes to general power of court, and not to jurisdiction over particular estate, different rule prevails, sec. 76, p. 557
doctrine of federal courts as to right of another court to inquire into jurisdiction, sec. 76, p. 557
what necessary to give court jurisdiction to order sale, sec. 76, p. 557
not sufficient to show jurisdiction over estate, sec. 76, p. 557
application to sell separate proceeding and jurisdiction of must exist, sec. 67, p. 557
power generally depends upon statute, sec. 76, p. 557
but sometimes held to exist in court of equity without statute, sec. 76, pp. 557, 558
as a rule, courts of equity have no power to order sale of legal title, sec. 76, p. 558
but may set aside sale, when, sec. 76, p. 558
guardian can not sell without order of court, sec. 76, p. 558
petition for sale foundation of jurisdiction, sec. 76, p. 558
facts upon which sale authorized, jurisdictional, sec. 76, p. 558
and must be alleged in petition, sec. 76, p. 558
substantial compliance with statute sufficient, sec. 76, p. 558
what are the usual grounds for sale, sec. 76, p. 558
defects or errors do not affect jurisdiction, sec. 76, p. 559

Jurisdiction—*Continued.*
one good cause sufficient, although other causes not authorizing stated, sec. 76, p. 559
not existence of facts, but allegation of them gives jurisdiction, sec. 76, p. 559
whether allegations true or false, does not affect, sec. 76, p. 559
but not where record shows required proof was not made, sec. 76, pp. 559, 560
if it appears court determined jurisdictional facts, findings conclusive, sec. 76, p. 560
any evidence, sufficiency of not jurisdictional, sec. 67, p. 560
order of sale is adjudication of all facts necessary to give jurisdiction, sec. 76, p. 560
but if real estate goes to executor only if debts exist, if no debts proceeding void, sec. 76, p. 560
some of cases hold finding of debts only *prima facie* evidence of, sec. 76, pp. 560
to make finding conclusive, proceeding must be within general jurisdiction, sec. 76, p. 561
courts liberal in upholding, sec. 67, p. 561
record silent, filing of sufficient petition presumed, sec. 76, p. 561
petition must show proceeding brought in proper county, sec. 76, p. 561
where must be commenced, sec. 76, pp. 561, 562
must conform to laws of state where land situated, sec. 76, p. 562
but not necessary ward, or guardian, or executor reside there, sec. 76, p. 562
ancillary proceedings by non-residents, sec. 76, p. 562
minor non-resident court may appoint guardian over property, sec. 76, p. 562
order for sale of real estate in another state void, sec. 76, pp. 562, 568
court when may compel non-resident to convey, sec. 76, p. 562
decree when can not operate beyond jurisdiction, sec. 76, p. 562
some cases hold strict compliance with statute necessary, sec. 76, pp. 562, 563
but substantial compliance sufficient, sec. 76, p. 562
notice necessary, sec. 76, p. 563
petition gives jurisdiction of subject-matter, notice of the person, sec. 76, p. 563
held sale by guardian no notice to ward necessary unless required by statute, sec. 76, p. 563
but authorities the other way, sec. 76, pp. 563, 564
other statutory conditions must be complied with, sec. 76, p. 564
that have been complied with need not appear from record, sec. 76, p. 564
whether ward necessary party to proceeding by guardian, sec. 76, p. 564
authorities conflicting, sec. 76, p. 564
if necessary party must have notice, sec. 76, p. 564
whether heir necessary party to proceeding by executor or administrator, sec. 76, pp. 564, 565
depends upon requirement of statute, sec. 76, p. 565
distinction between sales by guardians and executors in this respect, sec. 76, p. 565
personal service of notice not necessary, sec. 76, p. 565
general notice to all persons usually sufficient, sec. 76, pp. 565, 566

Jurisdiction—*Continued.*
death of owner when does not deprive court of jurisdiction, sec. 76, p. 566
rule as to sufficiency of notice, sec. 76, p. 566
failure of guardian *ad litem* to answer, effect of, sec. 76, p. 566
failure to appoint guardian *ad litem*, effect of, sec. 76, p. 566
failure to notify guardian *ad litem* where ward served, effect of, sec. 76, pp. 566, 567
appointment of guardian *ad litem* gives no jurisdiction where minor not notified, sec. 76, p. 567
minor notified, guardian appointed, proceeding binding, sec. 76, p. 567
subsequent reversal of order, effect on purchaser, sec. 76, p. 567
notice presumed, sec. 76, p. 567
but limited in some cases to persons made parties to the record, sec. 76, p. 567
recitals in record as to notice, effect of, sec. 76, pp. 567, 568
jurisdiction appearing from record, purchaser need not look beyond, sec. 76, p. 568
usually held record imports verity, sec. 76, p. 568
cases the other way, sec. 76, p. 568
confirmation of sale, effect of, sec. 76, pp. 568, 569
proceedings by creditor for sale of real estate, principles affecting, sec. 76, p. 569
additional bond for sale, effect of failure to give, sec. 76, p. 569
defect in original bond does not affect jurisdiction, sec. 76, p. 570
proceedings may be removed to federal court, sec. 76, p. 570
whether legislature may order sale without intervention of court, sec. 76, pp. 570, 571
can not where no fiduciary relation on part of one authorized to sell, sec. 76, p. 571
sales in partition proceedings, sec. 76, p. 572
arbitration, sec. 77
defined, sec. 77, p. 572
two kinds, common law and statutory, sec. 77, p. 572
common law, submission may be by parol, sec. 77, p. 572
statutory, must be in writing, sec. 77, p. 572
common law, stands upon decision of arbitrators, sec. 77, p. 572
statutory award usually required to be reported to and confirmed by some court, sec. 77, p. 573
no particular form of submission necessary in former, sec. 77, p. 573
latter must conform to statute, sec. 77, p. 573
when defective statutory may be upheld as common law, sec. 77, p. 573
subject involves powers of arbitrators, sec. 77, p. 573
and effect of submission of pending actions on jurisdiction of court over, sec. 77, p. 573
also, in statutory, of power of court to confirm, sec. 77, p. 573
submission is measure and limitation of powers of arbitrators, sec. 77, p. 574
and this is true of submission of matters in court, sec. 77, p. 574
but subject to right of contestants to submit under statute, sec. 77, p. 574
matters in court, all parties must consent, sec. 77, p. 574
applies to statutory, sec. 77, p. 574
parties entitled to notice, sec. 77, p. 574
arbitrators must meet at time named in submission, sec. 77, p. 574

Jurisdiction—*Continued.*
parties must have opportunity to be present, sec. 77, p. 574
notice, how waived, sec. 77, pp. 574, 575
arbitrators limited as to time by submission, sec. 77, p. 575
award after time inoperative, sec. 77, p. 575
and returned to court too late, court can not confirm, sec. 77, p. 575
failure to meet at time appointed, effect of, sec. 77, p. 575
powers expire with making award, sec. 77, p. 575
can not alter or change award, sec. 77, p. 575
or make a new one where first is void, sec. 77, p. 575
attempt to change, effect of, sec. 77, p. 575
statute requiring submission to fix time of award, effect of, sec. 77, pp. 575, 576
power to appoint umpire, sec. 77, p. 576
award, when may be in parol, sec. 77, p. 576
statutory must conform to statute, sec. 77, p. 576
award must cover whole subject-matter submitted, sec. 77, p. 576
what must be shown to impeach for not including all, sec. 77, pp. 576, 577
submission of all matters in dispute, effect of, sec. 77, p. 577
whether award may be good in part and bad in part, sec. 77, p. 577
presumptions in favor of award, sec. 77, p. 577
what court may receive and confirm award, sec. 77, p. 577
submission, providing it be made rule of court not having jurisdiction, whole proceeding void, sec. 77, p. 578
statute not complied with, court has no jurisdiction, sec. 77, p. 578
but may be good as common law arbitration, sec. 77, p. 578
effect of failure to confirm, sec. 77, p. 578
parties may waive confirmation, sec. 77, p. 578
notice of time of confirmation necessary, sec. 77, p. 578
kind of notice required, sec. 77, p. 578
whether majority of arbitrators may make award, sec. 77, p. 579
effect of submission of pending action, sec. 77, pp. 579, 580
agreement to arbitrate does not deprive court of jurisdiction, sec. 77, p. 580
what necessary to authorize court to render judgment on award, sec. 77, p. 580
appeal may be taken from such judgment, sec. 77, p. 580
reference of pending action to referee, effect of, sec. 77, p. 581
effect of judgment on award, sec. 77. p. 581
whether arbitrator must be sworn, sec. 77, p. 581
ne exeat and arrest and bail, sec. 78
what is, sec. 78, p. 581
not confined to equitable actions, sec. 78, p. 582
nature of demand for which will issue, sec. 78, p. 582
statutory proceedings of arrest and bail, to what kinds of actions applicable, sec. 78, p. 583
provision of constitution against imprisonment for debt, effect of, sec. 78, p. 583
remedy usually confined to cases of fraud, concealment of property, or breach of fiduciary obligation, or tort, sec. 78, p. 583
statutes have increased classes of remedies in which may be had, sec. 78, p. 584
arrest and bail, object and purposes of, sec. 78, pp. 584, 585
effect of codes on powers of courts of equity in, sec. 78, p. 585
similar to attachment, when, sec. 78, p. 585
petition for, what must show, sec. 78, p. 585

Jurisdiction—*Continued.*
affidavit and undertaking necessary, sec. 78, p. 586
when may be commenced, sec. 78, p. 586
what affidavit must show, sec. 78, p. 586
when property must be shown to be subject to execution, sec. 78, pp. 586, 587
in equity, when and how commenced, sec. 78, p. 587
not a mere provisional remedy, sec. 78, p. 587
statutes must be strictly complied with, sec. 78, p. 587
defective affidavit or petition may be amended, sec. 78, p. 587
so of undertaking, sec. 78, p. 587
where writ may issue, sec. 78, p. 588
not allowed in equity if adequate remedy at law, sec. 78, p. 588
and rule the same under statutory for arrest and bail, sec. 78, p. 588
injunctions, sec. 79
is an equitable remedy, sec. 79, p. 588
but has become statutory, sec. 79, p. 588
remains much the same as it was under equity practice, sec. 79, p. 588
combination of common law and equity under codes has not changed, sec. 79, p. 589
jurisdiction of appellate courts over, sec. 79, p. 589
statutes have extended jurisdiction in affording, sec. 79, p. 589
of federal courts can not be increased by state laws, sec. 79, p. 589
particular classes of cases considered, sec. 79, pp. 589, 590
grounds upon which relief will be granted, sec. 79, p. 590
can not be had where an adequate remedy at law, sec. 79, p. 591
and want of, must be affirmatively shown, sec. 79, p. 591
what will amount to adequate remedy at law, sec. 79, pp. 591–594
solvency of defendant, when material, sec. 79, p. 592
extraordinary remedy at law will defeat right, sec. 79, p. 593
against whom may issue, sec. 79, p. 594
granting of, rests in discretion of court, sec. 79, p. 594
power usually confined to courts of original jurisdiction, sec. 79, p. 594
how far may be exercised by appellate courts, sec. 79, pp. 594–600
right to, lost by failure to ask in time, sec. 79, p. 600
when courts may enjoin collection of taxes, sec. 79, pp. 600–606
power to enjoin issuance and sale of municipal bonds, sec. 79, pp. 606–608
power to enjoin judicial proceedings and when will be exercised, sec. 79, pp. 608–612
power to restrain acts of subordinate tribunals or officers, sec. 79, pp. 612, 613
courts can not control action by independent department of government by, sec. 79, p. 613
can not be used to determine title to office, sec. 79, p. 613
no jurisdiction in criminal cases, not affecting property, sec. 79, p. 614
temporary, may be granted without notice, sec. 79, p. 614
but only until notice given, sec. 79, p. 614
notice may be waived, sec. 79, p. 614
mandamus, sec. 80
was formerly common law writ, sec. 80, p. 614
now generally statutory writ of common law nature, sec. 80, p. 614
nominally a prerogative writ, sec. 80, p. 614
but considered a writ of right, sec. 80, pp. 614, 615
in what sense an extraordinary remedy, sec. 80, p. 615

Jurisdiction—*Continued.*
whether issuable only within discretion of court, sec. 80, pp. 615, 616
writ essentially the same in all the states, sec. 80, p 616
may issue against all classes of officers, sec. 80, pp. 616, 617
what acts may be compelled by, sec. 80, pp. 617, 618
matter of discretion can not be controlled by, sec. 80, p. 617
can not be used as writ of error, sec. 80, p. 618
exception as to setting aside non-appealable error, sec. 80, p. 618
will issue on showing of abuse of discretion, sec. 80, pp. 618, 619
remedy by ordinary proceeding, when will defeat right to, sec 80, p. 619
can not issue for obligation growing out of contract, sec. 80, p 619
or affecting mere private right, sec. 80, pp. 619, 620
other remedy does not affect right to in some states, sec. 80, p. 619
sometimes said only ministerial duties may be enforced by, sec 80, p. 620
but may enforce judicial duties, sec. 80, p. 620
with exception that can not control discretion or judgment, sec 80, p. 620
what acts a court or judge may be compelled to perform, sec. 80, pp. 620–623
where refuses to act at all, sec. 80, p. 620
so where special judge refuses to act, sec. 80, p. 621
if duty to act imperative, character of act immaterial sec. 80, p. 623
writ used to compel payment of amount due from public corporation, sec. 80, p. 624
or to levy a tax for such purpose, sec. 80, p. 624
but not to collect simple debt from corporation, sec. 80, p. 624
federal court judgment for amount must first be recovered, sec. 80, p. 624
how far used in matters affecting title to office, sec. 80, p. 624
attorney disbarred may be restored by, when, sec. 80, p. 624
may be used to compel acceptance of office when elected to, sec. 80, pp. 624, 625
jurisdiction of federal courts to issue, sec. 80, p. 625
power of appellate courts to issue, sec. 80, pp. 625–627
as against non-residents, constructive notice may be given, sec. 80, p. 627
power over inferior courts confined to territorial limits, sec. 80, p. 627
proceedings in, are not special cases, sec. 80, p. 627
power of judges to issue at chambers, sec. 80, p. 627
power to issue usually confined to superior courts, sec. 80, p. 627
prohibition, sec. 81
formerly a common-law writ, sec. 81, p. 627
now almost wholly statutory, sec. 81, p. 627
object of to restrain judicial tribunals from acting without or in excess of their jurisdiction, sec. 81, pp. 628, 629
extent of jurisdiction under statutes, sec. 81, p. 628
general nature of writ same as at common law, sec. 81, p. 628
jurisdiction to issue given by constitution means common-law writ, sec. 81, p. 629
statute extending to ministerial acts upheld, sec. 81, p. 629
is preventive writ and can not issue after act done, sec. 81, p. 629
can not issue to prevent commencement of action, sec. 81, p. 629
further action may be restrained at any stage, sec. 81, p. 629

Jurisdiction—*Continued.*
may issue after judgment to prevent enforcement, sec. 81, p. 629
acts partially completed will annul what has been done and prevent completion, sec. 81, pp. 629, 630
lies where lower court has been deprived of jurisdiction, sec. 81, p. 630
power to issue belongs to superior courts only, sec. 81, p. 630
when may issue by supreme court of United States, sec. 81, p. 630
and by other federal courts, sec. 81, p. 631
in what sense is extraordinary writ, sec. 81, p. 631
kind of remedy by ordinary proceeding that will prevent its issuance, sec. 81, pp. 631, 632, 636
usually denominated a prerogative writ, sec. 81, p. 631
but treated generally as writ of right, sec. 81, p. 631
but sometimes held to issue only at discretion, sec. 81, p. 631
is jurisdictional writ, sec. 81, pp. 631, 632
will not issue to correct errors, sec. 81, pp. 631, 632
right to *certiorari* or appeal when will defeat writ, sec. 81, pp. 632, 633, 636
delay in enforcement of other remedies, effect of, sec. 81, pp. 632, 633
question of jurisdiction must be presented to lower court first, sec. 81, p. 633
but failure to raise question below not absolute bar, sec. 81, pp. 633, 634
will lie for want of jurisdiction of the person, sec. 81, p. 634.
distinction between want or excess of jurisdiction, and error, sec. 81, pp. 634, 635
not confined to inquiry as to jurisdiction of general subject-matter, sec. 81, pp. 635 636
where question upon sufficiency of service, effect of finding of lower court, sec. 81, p. 636
different rule where no service, or service could not give jurisdiction if made, sec. 81, p. 636
when right to change of venue speedy and adequate remedy, sec. 81, pp. 636, 637
service procured by fraud, or when privileged writ will issue, sec. 81, pp. 636, 637
appellate courts power of to issue, sec. 81, p. 637
whether appeal will lie from order refusing, sec. 81, pp. 637, 638
power of judges at chambers, sec. 81, p. 638
proper remedy to prevent action by disqualified judge, sec. 81, p. 638

habeas corpus, sec. 82
object of the writ, sec. 82, pp. 638, 639
right to exists independently of, and can not be taken away by statute, sec. 82, p. 639
power to issue given generally to all superior courts, state and national, sec. 82, p. 639
appeal generally allowed in cases of, sec. 82, p. 639
if not, *certiorari* lies, sec. 82, p. 639
ground of doctrine in some states that can be no appeal, sec. 82, p. 639
causes for not generally provided by statutes, sec. 82, pp. 639, 640
general principles upon which was issued by courts in England control courts in this country, sec. 82, p. 640

Jurisdiction—*Continued.*
causes for have been increased and powers of courts extended, sec. 82, p. 640
can issue against judicial officers only to test jurisdiction, sec. 82, p. 640
to what extent jurisdiction may be inquired into, sec. 82, pp. 640–643
excessive or unwarranted sentence imposed when ground for the writ, sec. 82, pp. 641–643
sufficiency of indictment when may be inquired into, sec. 82, p. 643
surrender of fugitive from justice how far proceedings may be tested by, sec. 82, pp. 643–645
when writ will lie to test sufficiency of evidence, sec. 82, p. 645
judgment of competent court sufficiency of will not be inquired into, sec. 82, pp. 646, 647
when question whether law under which court acted was constitutional may be determined by, sec. 82, pp. 646, 647
and where statute repealed, sec. 82, pp. 646, 647
petitioner may be discharged before or after final judgment, sec. 82, p. 647
judgment out of term time void and writ will issue, sec. 82, p. 647
must be actual imprisonment, sec. 82, p. 648
writ confined to question of release or recommitment, sec. 82, p. 648
can not determine property rights, sec. 82, p. 648
is a writ of right, sec. 82, p. 648
but courts have discretion as to issuance of, sec. 82, p. 648
applies where one not speedily brought to trial, sec. 82, p. 648
effect of failure to bring to trial, sec. 82, pp. 648, 649
when question of legality of confinement must be determined from the record, sec. 82, p. 649
extent of jurisdiction of federal courts over, sec. 82, pp. 649–658
power of state courts over proceeding in federal courts, sec. 82, pp. 654–658
and of imprisonment by federal officers, sec. 82, p. 656
generally held denial of writ no bar to another application, sec. 82, p. 658
but order discharging bars further prosecution, when, sec. 82, p. 658
territorial jurisdiction of courts in cases of, sec. 82, p. 658
may issue from one judge and be returnable to another, sec. 82, p. 658
change of venue, application for, when ground for the writ, sec. 82, pp. 658, 659
quo warranto, sec. 83
common law prerogative writ in nature of writ of right, sec. 83, p. 659
formerly issued out of chancery, sec. 83, p. 659
object of the writ, sec. 83, pp. 659, 660, 664, 665
superseded by information in nature of *quo warranto*, sec. 83, p. 660
modern proceeding by information defined, sec. 83, p. 660
proceedings by statute for contesting elections, sec. 83, p. 660
proceeding, whatever its form, has become statutory, sec. 83, p. 661
courts may still issue writ as originally existed, sec. 83, p. 661
statute providing other remedy does not take away jurisdiction in, sec. 83, p. 661
held otherwise in some of the states, sec. 83, p. 661
courts of equity, jurisdiction of, sec. 83, p. 662

Jurisdiction—*Continued.*
grant of power to issue writ includes information in nature of, sec. 83, p. 662
includes power to inquire into existence of private corporations or right to exist, when, sec. 83, p. 662
power extends to municipal corporations and officers, sec. 83, p. 662
extent of the power in such cases, sec. 83, pp. 662, 663
when proceeding must be against corporation and when against individuals claiming to be, sec. 83, p. 663
against corporation admits its existence, sec. 83, p. 663
some cases the other way, sec. 83, p. 663
distinction between municipal and private corporations in this respect, sec. 83, p. 664
formerly regarded as criminal proceeding, sec. 83, p. 664
and brought in name of prosecuting officer, sec. 83, p. 664
but under most statutes treated as civil, sec. 83, p. 664
but criminal in its objects and nature, sec. 83, p. 664
object of the proceeding, sec. 83, pp. 664, 665
penalty imposed, what is, sec. 83, p. 665
writ not allowed as of course, but issues on order of court, sec. 83, p. 665
distinction as to this between proceedings on behalf of state and on behalf of private individual, sec. 83, pp. 665, 666
in whose name may be prosecuted, sec. 83, pp. 666, 667
what may be shown to authorize proceeding by private individual, sec. 83, p. 667
power of court sometimes limited by amount in controversy, sec. 83, p. 667
constitutionality of statute, when may be tested by, sec. 83, p. 667
jurisdiction to inquire into right to hold office extends to all classes of officers, sec. 83, p. 668
how far may inquire into right to membership in legislative body, sec. 83, p. 668
how far affected by vesting such power in the body itself, sec. 83, p. 668
jurisdiction does not depend upon whether office claimed by appointment or popular vote, sec. 83, pp. 668, 669
remedy extraordinary, sec. 83, p. 669
can not be resorted to if adequate remedy by ordinary proceeding, sec. 83, p. 669
only applicable where public has an interest, sec. 83, p. 669
can not be used to test right to purely private office or employment, sec. 83, p. 669
what may be determined under, in case of contest for office, sec. 83, pp. 669, 670
foreign corporation may be prevented from doing business in state, when, sec. 83, p. 670

new trials and vacation of judgments, sec. 84
by what means party may be relieved from erroneous or void judgment, sec. 84, pp. 670, 671
audita querela almost obsolete, but exists in some states, sec. 84, p. 671
its objects, sec. 84, p. 671
power to grant new trials inherent, sec. 84, p. 671
and can not be taken away by statute, sec. 84, p. 671
whether inferior courts possess, sec. 84, pp. 671, 672
distinction made between power to vacate and modify and to grant new trials, sec. 84, p. 672

Jurisdiction—*Continued.*
inherent powers may be limited and controlled, and this has been done, sec. 84, pp. 672, 673
statutes provide the time when and means by which relief may be had, sec. 84, p. 673
statute not grants of, but limitations upon the power, sec. 84, p. 673
extent and object of the inherent power to give relief, sec. 84, p. 673
for mere errors, within legislative control, sec. 84, p. 673
courts have control over their judgments until end of term, sec. 84, pp. 673, 674
and may, within the term, vacate or modify its judgments or grant new trials, sec. 84, p. 674
after term judgments final and power over ceases, sec. 84, p. 674
and can only be regained by new proceedings, sec. 84, p. 674
what necessary to give jurisdiction of new proceeding, sec. 84, p. 674
notice how served, sec. 84, p. 674
may be waived, sec. 84, p. 674
requirement that judgment must be vacated during term, may be waived, sec. 84, p. 674
when proceeding for new trial under statutes must be commenced, sec. 84, pp. 675, 676, 678
if court acts after time limited, proceedings void, sec. 84, p. 676
some cases to the contrary, sec. 84, p. 676
time can not be extended, unless authorized by statute, sec. 84, p. 676
except by consent of parties, sec. 84, p. 676
party may be relieved from a failure to act in time in case of fraud or mistake, sec. 84, pp. 676, 677
statutory exceptions to rule that proceedings must be commenced within certain time, sec. 84, pp. 676, 677
exceptions independently of statute, sec. 84, p. 677
statute limiting time, how far binding on the courts, sec. 84, pp. 677, 678
judgment may, by statute, be made final before end of term, sec. 84, p. 679
appeal does not deprive court of power over judgment during term, sec. 84, p. 680
statutes are limitations of *grounds* for new trial and vacation of judgment as well as to *time*, sec. 84, pp. 680, 681
limitations apply only to erroneous and not to void judgments, sec. 84, p. 681
latter open to attack at any time, sec. 84, p. 681
but not necessarily where invalidity does not appear on face of record, sec. 84, p. 681
right to new trial confined to grounds specified in statute, sec. 84, p. 682
and made the basis of the motion, sec. 84, p. 682
courts of equity may grant new trials and vacate judgments of other courts, sec. 84, pp. 682, 683
how far and for what causes such power will be exercised, sec. 84, pp. 682, 683
how far one court may vacate or set aside proceedings of court of concurrent jurisdiction, sec. 84, pp. 683, 684
can not upon mere motion, sec. 84, p. 683
but may by independent action, sec. 84, p. 683

Jurisdiction—*Continued.*
not, however, while action is still pending in the other court, sec. 84, p. 683
and adequate remedy by motion in court rendering judgment, other court will not interfere, sec. 84, p. 683
but refusal does not rest on want of jurisdiction, sec. 84, pp. 683, 684
federal courts, power of, to set aside proceedings of state courts, sec. 84, p. 684
statutes authorizing vacation or review do not take away general equity jurisdiction to vacate and annul, sec. 84, p. 684
power does not extend to correction of errors, sec. 84, p. 685
courts of chancery proceed on equitable grounds, sec. 84, p. 685
will not vacate because void, unless inequitable, sec. 84, p. 685
what character of fraud will authorize vacation of judgment, sec. 84, pp. 685, 688
must be extrinsic or collateral to the matter determined by the court, sec. 84, p. 685
fact that judgment procured by perjury or false evidence will not authorize, sec. 84, pp. 686, 687
different rule in some states, sec. 84, p. 687
court of equity will not interfere if other adequate remedy, sec. 84, p. 688
proceeding to vacate, can not retry questions of law or fact, sec. 84, p. 688
appropriate remedy in court of equity by bill of review, sec. 84, p. 688
remedy abolished in some states, sec. 84, p. 688
but original action of like nature may be prosecuted, sec. 84, p. 688
new trial may be granted of part of issues, sec. 84, p. 688
but not so as to finding of part of facts, sec. 84, p. 688
proceeding to vacate by court rendering usually by motion, sec. 84, p. 689
when relief can not be obtained by action in another court, sec. 84, p. 689
when only by independent action, sec. 64, pp. 689, 690
for relief on account of errors, remedy is by motion for new trial in court rendering judgment, sec. 84, p. 690
writ of *coram nobis*, what is, and objects of, sec. 84, p. 690
and writ of *recordari*, sec. 84, p. 690
remedy by motion held a direct attack, sec. 84, p. 690
after final determination of action, to what remedy by motion confined, sec. 84, p. 690
when independent action necessary, sec. 84, p. 690
order vacating not generally reviewable by court making it, sec. 84, pp. 690, 691
but may be set aside during term, sec. 84, p. 691
to what court and where motion for new trial must be made, sec. 84, p. 691
action to annul, where must be brought, sec. 84, p. 691
in federal courts, decision on not subject to review, how far motion for is, sec. 84, p. 691
addressed to discretion of court, sec. 84, p. 691
exception to ruling on, how taken, sec. 84, p. 691
new trial as of right, when allowed, sec. 84, p. 692
whether new trial can be had after entry of judgment, sec. 84, p. 692

Jurisdiction—*Continued.*
when affirmance on appeal not a bar to motion, sec. 84, p. 692
writs of error, sec. 85
are of two kinds, sec. 85, p. 692
coram nobis, nature and objects of, sec. 85, p. 692
and of *coram vobis*, sec. 85, pp. 692, 693
former almost out of use, sec. 85, p. 693
writ of error as now used defined, sec. 85, p. 693
is a common-law remedy for correction of errors, sec. 85, p. 694
regulated, at present day, by statute, sec. 85, p. 694
not applicable to special statutory proceedings, sec. 85, p. 694
record on, can not be contradicted, sec. 85, p. 694
record, what must contain, sec. 85, p. 694
as existed at common law, could not review order after judgment, sec. 85, p. 694
in what cases proper remedy in federal courts, sec. 85, p. 694
proper in criminal case, sec. 85, p. 694
confined to common-law actions, sec. 85, p. 695
but subject to statutory control, sec. 85, p. 695
can not be used to control discretion of lower court, sec. 85, p. 695
will issue only after final judgment, sec. 85, p. 695
generally treated as writ of right, sec. 85, p. 695
coram nobis not writ of right, sec. 85, p. 695
litigants have no vested right to, and may be taken away by statute, sec. 85, p. 695
only allowed to party or privy, sec. 85, p. 696
sometimes confined to parties of record, sec. 85, p. 696
so far original proceeding as to require notice and making of issues, sec. 85, p. 696
is put in motion by petition, sec. 85, p. 696
and summons or citation issues, sec. 85, p. 696
pleading is assignment of errors, sec. 85, p. 696
only errors assigned can be considered, sec. 85, p. 696
decision of court below necessary foundation of jurisdiction, sec. 85, p 696
must appear by record to have been presented and decided, sec. 85, pp. 696, 697
errors of fact can not be corrected by, sec. 85, p. 697
writ has been abolished in some states, sec. 85, p. 697
legislature may regulate, sec. 85, p. 697
appeal supersedes, when, sec. 85, p. 697
suspends proceedings in court below, sec. 85, p. 698
but does not vacate judgment, sec. 85, p. 698
jurisdiction of, can not be conferred by statute, sec. 85, p. 698
certiorari, sec. 86
defined, sec. 86, pp. 698, 699
objects of, sec. 86, pp. 698–701, 712–717
whether right of appeal or writ of error will bar right to, sec. 86, pp. 698, 699
to what extent power to issue inherent and beyond legislative interference, sec. 86, p. 699
to what courts may issue, sec. 86, pp. 699–702
where remedy can not be had by writ of error, sec. 86, p. 700
definition given does not cover writ as at present used, sec. 86, p. 702
at common law was extraordinary legal remedy, sec. 86, p. 703

Jurisdiction—*Continued.*
but has become to a great extent ordinary writ for correction of errors, sec. 86, p. 703
at what time may issue, sec. 86, pp. 703, 704
what relief may be granted under, sec. 86, p. 704
is remedial and not preventive, sec. 86, p. 704
in some states can only issue to test jurisdiction, sec. 86, p. 704
and not to correct errors, sec. 86, p. 704
but extends to jurisdiction of the person, sec. 86, pp. 704, 705
held may inquire whether lower court proceeded regularly and according to law, sec. 86, p. 705
meaning of "regularly and according to law," sec. 86, pp. 705, 706
what is meant by acting "illegally" under statutes authorizing writ on that ground, sec. 86, p. 707
strict limitation of the use of the writ in some cases, sec. 86, pp. 708, 709
trial without a hearing is an excess of jurisdiction, sec. 86, pp. 708, 709
distinction made between cases where is another remedy and those where there is none, as to the extent of the remedy, sec. 86, p. 709
in many cases extended to review of questions of law, sec. 86, p. 710
and consideration of the evidence, sec. 86, p. 710
distinction made in this respect between courts and *quasi* judicial bodies, sec. 86, p. 710
and between courts acting summarily and when not, sec. 86, p. 710
right of appeal not absolute bar to, sec. 86, p. 711
allowed to serve purpose of writ of error where latter can not be resorted to, sec. 86, p. 711
or where right of appeal lost without fault, sec. 86, pp. 711, 712
in some states has choice of resorting to writ or to appeal, or writ of error, sec. 86, p. 712
in others, held can not be used as substitute for an appeal, sec. 86, p. 712
from what courts may issue, sec. 86, p. 712
confusion as to objects of writ by reason of statutes, sec. 86, pp. 712, 713, 714
liberal use of, in some states, sec. 86, pp. 714, 715
conflict in the decisions as to the scope of the remedy, sec. 86, pp. 712–716
whether may be used to compel lower court to proceed with action, sec. 86, p. 716
writ of same name allowed to bring up part of record, sec. 86, p. 716
used in connection with *habeas corpus*, sec. 86, p. 717
bills of *certiorari* in chancery, objects of, sec. 86, p. 717
writ brings up entire record for review, sec. 86, p. 717
question must be determined by record, sec. 86, p. 717
when the evidence may be looked to, sec. 86, pp. 718, 719
general scope of the remedy, sec. 86, pp. 718–721
can not be used to test legal existence of corporation, sec. 86, p. 721
issuance of, in what sense within the discretion of the court, sec. 86, pp. 721, 722
right to may be lost by laches, sec. 86, p. 722
operates as a *supersedeas*, sec. 86, p. 722
can not be issued by judge at chambers, sec. 86, p. 722

Jurisdiction—*Continued.*
what judgment may be rendered under, sec. 86, p. 722
bills and writs of review, sec. 87
bill of review in equity similar to writ of error, sec. 87, p. 722
may be brought for error appearing on face of record, sec. 87, p. 722
when question must be determined by record, sec. 87, p. 723
bills in nature of review, objects of, sec. 87, p. 723
bills for impeachment of decrees for fraud, sec. 87, p. 723
proceedings have fallen into disuse in most of the states, sec. 87, p. 723
included in writs of error and *certiorari*, sec. 87, p. 723
writs of review provided for by statutes, sec. 87, pp. 723, 724
ules respecting *certiorari* apply to writs of review, sec. 87, p. 724
statutory remedies in the nature of, sec. 87, pp. 723–725
when lies for newly discovered evidence or new matter, sec. 87, p. 725
statutory not applicable to decrees of divorce, sec. 87, p. 725
based on errors of law what complaint under statutory proceeding must contain, sec. 87, p. 725
differs from action to annul judgment, how, sec. 87, p. 725
remedy by does not supersede power to annul or set aside judgment, sec. 87, p. 726
how and where action to review brought and prosecuted, sec. 87, p. 726
bars appeal, sec. 87, p. 726
what judgments are subject to revieiw by under codes, sec. 87, p. 727
court of concurrent jurisdiction can not entertain, sec. 87, p. 727
decree under can not be reviewed, sec. 87, p. 727
appeals, sec. 88
origin of the right of, sec. 88, p. 728
is now wholly statutory, sec. 88, p. 728
what may be reviewed by, sec. 88, p. 728–730
how jurisdiction in given, sec. 88, p. 730
not proper to remove cause from state court to supreme court of United States, sec. 88, p. 730
when remedy must be sought, sec. 88, p. 730
courts can not extend time given by statute, sec. 88, p. 731
generally will only lie from final judgments, sec. 88, p. 731
but provided otherwise in some states, sec. 88, pp. 731, 732
right of appeal in all cases depends upon the statute, sec. 88, p. 732
may be taken from part of judgment, sec. 88, p. 732
notice of appeal required, sec. 88, pp. 732, 733, 734
notice to co-parties when necessary and object of, sec. 88, pp. 732, 733
who must be joined in the appeal, sec. 88, p. 733
notice in what cases dispensed with, sec. 88, p. 733
notice may be waived, sec. 88, p. 733
who must be notified, sec. 88, pp. 733, 734
bond when required and effect of failure to give, sec. 88, p. 734
affidavit on appeal when necessary, and effect of failure to make, sec. 88, p. 734
provision usually made for amendment, sec. 88, p. 734
record on appeal what must contain, sec. 88, p. 735
motion for new trial when necessary as foundation for, sec. 88, p. 735

Jurisdiction—*Continued.*
assignment of errors, necessity for and when must be filed, sec. 88, p. 735
requirements of statute are limitations upon jurisdiction, sec. 88, p. 736
only questions presented by the record can be considered, sec. 88, p. 736
exceptions, sec. 88, p. 736
effect of appeal on jurisdiction of court below, sec. 88, p. 736
inherent powers of appellate courts, sec. 88, p. 736
may be prevented from acting when, and how, sec. 88, p. 736
jurisdiction can not be given by consent, sec. 88, p. 737
naturalization, sec. 89
in what courts jurisdiction vested, sec. 89, p. 737
extent of discretion vested in courts as to, sec. 89, pp. 737–739
power to provide for exclusively in congress, sec. 89, p. 737
preliminary proceedings before clerk ministerial, sec. 89, p. 739
when preliminary declaration dispensed with, sec. 89, p. 739
final proceedings judicial and adjudication conclusive, sec. 89, p. 739
certificate how may be overthrown, sec. 89, pp. 739, 740
proceeding to annul in what court may be prosecuted, sec. 89, p. 740
how adjudication can be shown, sec. 89, p. 740
when will be presumed, sec. 89, p. 740
power of courts to amend their records in proceedings for, sec. 89, p. 740
when certificate of admission takes effect, sec. 89, pp. 740, 741
nature and character of jurisdiction of state courts in, sec. 89, p. 741
what are courts of record within the meaning of the law authorizing, sec. 89, p. 741
necessary qualifications of court to grant, sec. 89, p. 742
here declaration of intention may be made, sec. 89, p. 742
misnomer of applicant, effect of, sec. 89, p. 742
pardons, sec. 90
effect of on judgment of court, sec. 90, p. 742
power is not judicial, sec. 90, p. 742
is an executive power, sec. 90, p. 742
defined, sec. 90, p. 742
includes power to reprieve, sec. 90, p. 743
but not of commutation, sec. 90, p. 743
in whom vested, sec. 90, p. 743
given by constitution can not be taken away by statute, sec. 90, p. 743
can not be exercised by legislature, sec. 90, p. 743
generally withheld in cases of impeachment and treason, sec. 90, p. 744
at what stage of proceedings may be exercised, sec. 90, p. 744
can not be enforced against consent of party to be benefited, sec. 90, p. 744
conditional, effect of, sec. 90, p. 744
once granted can not be revoked except conditional and condition broken, sec. 90, p. 744
power to recommit for violation of conditional, by whom and how exercised, sec. 90, p. 745
notice of hearing to recommit when necessary, sec. 90, p. 745

Jurisdiction—*Continued.*
statutes authorizing deductions for good behavior not infringement of pardoning power, sec. 90, p. 745
procured by fraud is void, sec. 90, p. 745

Jurisdiction as to Amount—
courts can not maintain jurisdiction of case involving more or less than statutory limit, sec. 16, p. 59
fixed by constitution, legislature can not increase, sec. 16, p. 59
amount alleged in plaintiff's pleading controls, sec. 16, p. 59
sometimes held prayer for relief controls, sec. 16, p. 59
in others that parol proof may be heard to show amount in controversy, sec. 16, p. 59
amount alleged in bad faith disregarded, sec. 16, p. 59
complaint several counts, total of all determines, sec. 16, p. 59
but held in such case conclusion of pleading controls, sec. 16, p. 59
account filed as complaint, footing determines, sec. 16, p. 60
rule as to, where defendants jointly sued, sec. 16, p. 60
where verdict of jury for less than jurisdictional amount, sec. 16, p. 60
and in action of replevin, where value found to be below, sec. 16, p. 60
interest and costs usually excluded by statute in fixing limitation, sec. 16, p. 60
this the provision of statute fixing jurisdiction of federal courts, sec. 16, p. 60
attorneys' fees part of indebtedness, sec. 16, p. 61
effect of judgment for less than amount, sec. 16, p. 61
excess may be remitted and save jurisdiction, sec. 16, p. 61
running account can not be divided to give, sec. 16, p. 61
failing to claim interest, effect of, sec. 16, p. 62
in federal courts, amount necessary to give must be alleged, sec. 16, p. 62
test in action to quiet title, sec. 16, p. 62
in action to set aside fraudulent conveyance, sec. 16, p. 62
in federal court, amount alleged not conclusive, sec. 16, p. 63
what test as to value of property, sec. 16, p. 63
successful defense as to part does not defeat jurisdiction, sec. 16, p. 63
rule in case of creditor's bill, sec. 16, p. 63
counterclaim or set-off, effect of, sec. 16, p. 63
receiver of national bank not affected by limit, sec. 16, p. 63
nor agent of, sec. 16, p. 63
nor when United States a party, sec. 16, p. 64
rules affecting appellate jurisdiction, sec. 16, pp. 64–67
in garnishment proceedings, what controls, sec. 75, p. 551

Jurisdiction of the Person—
how obtained, sec. 11, p. 31
may be given by consent, sec. 13, p. 36
objection to, may be waived how, sec. 13, p. 36; sec. 22, p. 103
court having lost, how restored by act of defendant, sec. 13, p. 36
general appearance gives consent, sec. 13, p. 37
special appearance, what is, and its effects, sec. 13, p. 37
to be special, must be on jurisdictional grounds, sec. 13, p. 37
in some states special appearance waives defects in service, sec. 13, p. 37
special mode of appearance in England, sec. 13, p. 37
appearance may be entered by attorney, sec. 13, p. 38
by unauthorized attorney, effect of, sec. 13, pp. 38

Jurisdiction of the Person—*Continued.*
how relief from unauthorized appearance may be had and its effect, sec. 13, pp. 38–41
presumption that appearance authorized, sec. 13, p. 41
record showing appearance not conclusive, sec. 13, p. 41
distinction between domestic and foreign judgments as to effect of recitals, sec. 13, p. 41
two kinds of service, actual and constructive, sec. 13, p. 41
distinction between, sec. 13, p. 41
acknowledgment of service how made, and effect of, sec. 13, p. 41
jurisdiction authorizing personal judgment, how obtained, sec. 13, p. 42
service out of state is constructive, sec. 13, p. 42
when constructive service allowed, sec. 13, p. 42
service by copy in state is personal, sec. 13, p. 43
non-resident may be served if found, sec. 13, p. 43
non-resident plaintiff may maintain action, sec. 13, p. 43
can be no appearance for minor, sec. 13, p. 43
how jurisdiction of the person proved, sec. 23, p. 125
when personal service necessary to give, sec. 33, p. 214

Jury—
trial by, when necessary to constitute due process of law, sec. 33, pp. 218, 219, 221, 222
defendant entitled to, in cases triable by jury at common law, sec. 33, p. 222
law requiring prosecution in county rests upon right to trial by, sec. 69, p. 478
is a right that can not be taken away by statute, sec. 69, p. 478
entitled to have selected from county, sec. 69, p. 478

Justices of the peace—
courts of, whether courts of record, sec. 6, p. 8
when liable for acts done in excess of jurisdiction, sec. 64, p. 417
power of, to punish for contempt, sec. 72, p. 500

L

Law of the Land. (See Due Process of Law.)
defined, sec. 33, pp. 208, 209
due process of law intended to convey same meaning, sec. 33, p. 208

Legislature—
powers of, sec. 29, pp. 186–196
how far powers of may be controlled by courts, sec. 29, pp. 183–196
power of, to provide for constructive service of process, sec. 33, pp. 213–215
when can not authorize an injunction, sec. 33, pp. 219, 220
may require railroad to be fenced, and make failure conclusive evidence of negligence, sec. 33, p. 220
can not deprive party of right to resort to the courts, sec. 33, p. 222
but may regulate time and manner of seeking remedy, sec. 33, p. 222
power of, to confer or take away jurisdiction of judges, sec. 54, pp. 355–360
power of, to punish for contempt, sec. 54, p. 359; sec. 72, p. 496
power of, to impose other than judicial duties on judges, sec. 55, p. 360
whether has power to authorize judge disqualified by interest to hold court, sec. 62, pp. 403–406

Legislature—*Continued.*
has power to regulate procedure on writ of error or appeal, sec. 85, p. 697
Liberty. (See Due Process of Law.)
meaning of, in constitution providing for due process of law, sec. 33, p. 209
Liens—
action to enforce specific, constructive notice allowed, sec. 38, p. 270
against vessels, how and through what courts may be enforced, sec. 70, pp. 483–487
Limited Jurisdiction. (See Courts, Inferior Courts; Special Jurisdiction.)
distinction between and special, sec. 7, p. 14
facts necessary to bring case within, must appear, sec. 20, p. 91
Local Actions. (See Actions; Change of Venue; Judgments.)

M

Mail—
service of process by, what sufficient proof of, sec. 39, pp. 289, 290
Mandamus—
judge may be compelled to act by, sec. 62, p. 411
was formerly common-law writ, sec. 80, p. 614
now generally statutory writ of common-law nature, sec. 80, p. 614
nominally a prerogative writ, sec. 80, p. 614
but considered a writ of right, sec. 80, pp. 614, 615
in what sense an extraordinary remedy, sec. 80, p. 615
whether issuable only within discretion of court, sec. 80, pp. 615, 616
writ essentially the same in all the states, sec. 80, p. 616
may issue against all classes of officers, sec. 80, pp. 616, 617
what acts may be compelled by, sec. 80, pp. 617, 618
matter of discretion can not be controlled by, sec. 80, p. 617
can not be used as writ of error, sec. 80, p 618
exception as to setting aside non-appealable order, sec. 80, p. 618
will issue on showing of abuse of discretion, sec. 80, pp. 618, 619
remedy by ordinary proceeding, when will defeat right to, sec. 80, p. 619
can not issue for obligation growing out of contract, sec. 80, p. 619
or affecting mere private right, sec. 80, pp. 619, 620
other remedy does not affect right to, in some states, sec. 80, p. 619
sometimes said only ministerial duties may be enforced by, sec. 80, p. 620
but may enforce judicial duties, sec. 80, p. 620
with exception that can not control discretion or judgment, sec. 80, p. 620
what acts a court or judge may be compelled to perform, sec. 80, pp. 620–623
where refuses to act at all, sec. 80, p. 620
so where special judge refuses to act, sec. 80, p. 621
if duty to act imperative, character of act immaterial, sec. 80, p. 623
writ used to compel payment of amount due from public corporation, sec. 80, p. 624
or to levy a tax for such purpose, sec. 80, p. 624
but not to collect simple debt from corporation, sec. 80, p. 624

Mandamus—*Continued.*
federal court judgment for amount must first be recovered, sec. 80, p. 624
how far used in matters affecting title to office, sec. 80, p. 624
attorney disbarred may be restored by, when, sec. 80, p. 624
may be used to compel acceptance of office when elected to, sec. 80, pp. 624, 625
jurisdiction of federal courts to issue, sec. 80 p. 625
power of appellate courts to issue, sec. 80, pp. 625–627
as against non-residents, constructive notice may be given, sec. 80, p. 627
power over inferior courts confined to territorial limits, sec. 80, p. 627
proceedings in, are not special cases, sec. 80, p. 627
power of judges to issue at chambers, sec. 80, p. 627
power to issue usually confined to superior courts, sec. 80, p. 627

Maritime Courts. (See ADMIRALTY AND MARITIME JURISDICTION.)
jurisdiction of, sec. 5, p. 6

Maritime Jurisdiction. (See ADMIRALTY AND MARITIME JURISDICTION; JURISDICTION.)

Married Women—
service of process on, how made, sec. 37, p. 265
on husband, when sufficient service on wife, sec. 37, p. 260
entitled to notice the same as any other person, sec. 37, p. 266

Means of Acquiring Jurisdiction, generally—
notice in some form necessary, sec. 32, p. 202; sec. 33, p. 211
pleading amended, new notice necessary, when, sec. 32, p. 202
manner of giving notice regulated by statute, sec. 32, p. 202
personal notice, when necessary, sec. 32, p. 203; sec. 33, pp. 213, 214
when constructive notice allowed, sec. 32, pp. 203, 204
what must be shown to authorize, constructive, sec. 32, p. 203
notice other than process of court, when allowed, sec. 32, pp. 204, 205
notice may be waived, sec. 32, pp. 205, 206

Military Courts. (See COURTS.)

Ministerial Acts—
what are, sec. 29, p. 185
how far may be controlled or enforced by courts, sec. 29, pp. 183, 185
courts or judges can not be compelled to perform, sec. 29, p. 194
issuing summons is, sec. 36, p. 247
when judge may perform, sec. 55, p. 362
will be enforced by mandamus, sec. 80, p. 620

Minors—
how served with process, sec. 37, p. 264

Mistake—
ground of equitable jurisdiction, sec. 9, p. 24

Mortgages. (See FORECLOSURE OF MORTGAGES.)
foreclosure of, constructive notice allowed, sec. 38, p. 270

Motions—
when cause dismissed on, for want of jurisdiction, sec. 22, pp. 106, 109, 112, 113
court may dismiss on its own, sec. 22, pp. 108, 111
in arrest of judgment, when objection to jurisdiction raised by, sec. 22, p. 109
to vacate judgment for want of jurisdiction, sec. 22, pp. 111, 118

Motion—*Continued.*
for non-suit on same ground, sec. 22, p. 112
motion to set aside judgment when a direct attack, sec. 22, p. 119
to dismiss appeal, when question of jurisdiction may be raised by, sec. 22, p. 114
and to vacate judgment, sec. 22, p. 114

Municipal bonds. (See Bonds.)
on what grounds courts of equity will enjoin issuance or sale of, sec. 79, pp. 606, 608

N

Naturalization—
in what courts jurisdiction vested, sec. 89, p. 737
extent of discretion vested in courts as to, sec. 89, pp. 737–739
power to provide for exclusively in congress, sec. 89, p. 737
preliminary proceedings before clerk ministerial, sec. 89, p. 739
when preliminary declaration dispensed with, sec. 89, p. 739
final proceedings judicial and adjudication conclusive, sec. 89, p. 739
certificate how may be overthrown, sec. 89, pp. 739, 740
proceeding to annul in what court may be prosecuted, sec. 89, p. 740
how adjudication can be shown, sec. 89, p. 740
when will be presumed, sec. 89, p. 740
power of courts to amend their records in proceedings for, sec. 89, p. 740
when certificate of admission takes effect, sec. 89, pp. 740, 741
nature and character of jurisdiction of state courts in, sec. 89, p. 741
what are courts of record within the meaning of the law authorizing, sec. 89, p. 741
necessary qualifications of court to grant, sec. 89, p. 742
where declaration of intention may be made, sec. 89, p. 742
misnomer of applicant, effect of, sec. 89, p. 742

Ne Exeat and Arrest and Bail—
What is, sec. 78, p. 581
not confined to equitable actions, sec. 78, p. 582
nature of demand for which will issue, sec. 78, p. 582
statutory proceedings of arrest and bail to what kinds of actions applicable, sec. 78, p. 583
provision of constitution against imprisonment for debt, effect of, sec. 78, p. 583
remedy usually confined to cases of fraud, concealment of property, or breach of fiduciary obligation, or tort, sec. 78, p. 583
statutes have increased classes of remedies in which may be had, sec. 78, p. 584
arrest and bail, object and purpose of, sec. 78, pp. 584, 585
effect of codes on powers of courts of equity in, sec. 78, p. 585
similar to attachment, when, sec. 78, p. 585
petition for what must show, sec. 78, p. 585
affidavit and undertaking necessary, sec. 78, p. 586
when may be commenced, sec. 78, p. 586
what affidavit must show, sec. 78, p. 586
when property must be shown to be subject to execution, sec. 78, pp. 586, 587
in equity when and how commenced, sec. 78, p. 587
not a mere provisional remedy, sec. 78, p. 587
statutes must be strictly complied with, sec. 78, p. 587
defective affidavit or petition may be amended, sec. 78, p. 587
so of undertaking, sec. 78, p. 587
where writ may issue, sec. 78, p. 588

Ne Exeat and Arrest and Bail—*Continued.*
not allowed in equity if adequate remedy at law, sec. 78, p. 588
and rule the same under statutory arrest and bail, sec. 78, p. 588

New Trials. (See New Trials and Vacation of Judgments.)

New Trials and Vacation of Judgments—
by what means party may be relieved from erroneous or void judgment, sec. 84, pp. 670, 671
audita querela almost obsolete, but exists in some states, sec. 84, p. 671
its objects, sec. 84, p. 671
power to grant new trials inherent, sec. 27, p. 180; sec. 84, p. 671
and can not be taken away by statute, sec. 84, p. 671
whether inferior courts possess, sec. 84, pp. 671, 672
distinction made between power to vacate and modify and to grant new trials, sec. 84, p. 672
inherent powers may be limited and controlled, and this has been done, sec. 84, pp. 672, 673
statutes provide the time when and means by which relief may be had, sec. 84, p. 673
statute not grants of but limitations upon the power, sec. 84, p. 673
extent and object of the inherent power to give relief, sec. 84, p. 673
for mere errors, within legislative control, sec. 84, p. 673
courts have control over their judgments until end of term, sec. 84, pp. 673, 674
and may, within the term, vacate or modify its judgments or grant new trials, sec. 84, p. 674
after term, judgments final and power over ceases, sec. 84, p. 674
and can only be regained by new proceedings, sec. 84, p. 674
what necessary to give jurisdiction of new proceeding, sec. 84, p. 674
notice, how served, sec. 84, p. 674
may be waived, sec. 84, p. 674
requirement that judgment must be vacated during term, may be waived, sec. 84, p. 674
when proceeding for new trial under statutes must be commenced, sec. 84, pp. 675, 676, 678
if court acts after time limited, proceedings void, sec. 84, p. 676
some cases to the contrary, sec. 84, p. 676
time can not be extended unless authorized by statute, sec. 84, p. 676
except by consent of parties, sec. 84, p. 676
party may be relieved from a failure to act in time in case of fraud or mistake, sec. 84, pp. 676, 677
statutory exceptions to rule that proceedings must be commenced within certain time, sec. 84, pp. 676, 677
exceptions independently of statute, sec. 84, p. 677
statute limiting time, how far binding on the courts, sec. 84, pp. 677, 678
judgment may, by statute, be made final before end of term, sec. 84, p. 679
appeal does not deprive court of power over judgment during term, sec. 84, p. 680
statutes are limitations of *grounds* for new trial and vacation of judgment as well as to *time*, sec. 84, pp. 680, 681
limitations apply only to erroneous and not to void judgments, sec. 84, p. 681
latter open to attack at any time, sec. 84, p. 781
but not necessarily where invalidity does not appear on face of record, sec. 84, p. 681

New Trials and Vacation of Judgments—*Continued.*
right to new trial confined to grounds specified in statute, sec. 84, p. 682
and made the basis of the motion, sec. 84, p. 682
courts of equity may grant new trials and vacate judgments of other courts, sec. 84, pp. 682, 683
how far and for what causes such power will be exercised, sec. 84, pp. 682, 683
how far one court may vacate or set aside proceedings of court of concurrent jurisdiction, sec. 84, pp. 683, 684
can not upon mere motion, sec. 84, p. 683
but may by independent action, sec. 84, p. 683
not, however, while action is still pending in the other court, sec. 84, p. 683
and adequate remedy by motion in court rendering judgment, other court will not interfere, sec. 84, p. 683
but refusal does not rest on want of jurisdiction, sec. 84, pp. 683, 684
federal courts, power of to set aside proceedings of state courts, sec. 84, p. 684
statutes authorizing vacation or review do not take away general equity jurisdiction to vacate and annul, sec. 84, p. 684
power does not extend to correction of errors, sec. 84, p. 685
courts of chancery proceed on equitable grounds, sec. 84, p. 685
will not vacate because void unless inequitable, sec. 84, p. 685
what character of fraud will authorize vacation of judgment, sec. 84, pp. 685, 688
must be extrinsic or collateral to the matter determined by the court, sec. 84, p. 685
fact that judgment procured by purjury or false evidence will not authorize, sec. 84, pp. 686, 687
different rule in some states, sec. 84, p. 687
court of equity will not interfere if other adequate remedy, sec. 84, p. 688
proceeding to vacate can not retry questions of law or fact, sec. 84, p. 688
appropriate remedy in court of equity by bill of review, sec. 84, p. 688
remedy abolished in some states, sec. 84, p. 688
but original action of like nature may be prosecuted, sec. 84, p. 688
new trial may be granted of part of issues, sec. 84, p. 688
but not so as to finding of part of facts, sec. 84, p. 688
proceeding to vacate by court rendering usually by motion, sec. 84, p. 689
when relief can not be obtained by action in another court, sec. 84, p. 689
when only by independent action, sec. 84, pp. 689, 690
for relief on account of errors remedy is by motion for new trial in court rendering judgment, sec. 84, p. 690
writ of *coram nobis* what is and objects of, sec. 84, p. 690
and writ of *recordari*, sec. 84, p. 690
remedy by motion held a direct attack, sec. 84, p. 690
after final determination of action to what remedy by motion confined, sec. 84, p. 690
when independent action necessary, sec. 84, p. 690
order vacating not generally reviewable by court making it, sec. 84, pp. 690, 691
but may be set aside during term, sec. 84, p. 691.

New Trials and Vacation of Judgments—*Continued.*
to what court and where motion for new trial must be made, sec. 84, p. 691
action to annul where must be brought, sec. 84, p. 691
in federal courts decision on not subject to review, how far motion for is, sec. 84, p. 691
addressed to discretion of court, sec. 84, p. 691
exception to ruling on, how taken, sec. 84, p. 691
new trial as of right, when allowed, sec. 84, p. 692
whether new trial can be had after entry of judgment, sec. 84, p. 692
when affirmance on appeal not a bar to motion, sec. 84, p. 692
legislature may regulate number of new trials, sec. 33, p. 222

Notaries Public—
whether have power to punish for contempt, sec. 72, p. 501

Notice—
in proceedings *in rem*, how given, sec. 14
personal service not necessary in proceedings *in rem*, sec. 14, p. 44
failure to give, does not render judgment *in rem* void, sec. 14, p. 44
non-resident may be personally served within the state, sec. 14, p. 47
alone not sufficient to give jurisdiction over property, sec. 14, p. 48
only parties notified affected by decree, sec. 14, pp. 49, 50
action purely *in rem*, notice may be general, sec. 14, p. 50
manner of giving is statutory, sec. 14, p. 51
state has authority to prescribe notice to be given to its own citizens, sec. 15, p. 52
may authorize process of court having jurisdiction over county to extend over state, .sec. 15, p. 53
but can not authorize extension of process into other state or country, sec. 15, p. 53
may, with consent of other state or country, sec. 15, p. 53
decree foreclosing mortgage may be rendered on constructive, sec. 15, p. 56
failure to give in proceedings *in rem* deprives court of jurisdiction, sec. 24, p. 154
presumptions in case of constructive, sec. 25, pp. 159, 160, 161
in some form necessary to give court jurisdiction, sec. 32, p. 202
manner of giving, regulated by statute, sec. 32, p. 203
personal usually required, sec. 32, p. 203
when substituted authorized, sec. 32, pp. 203, 204, 214, 215
may, if authorized, be given in some other way than by ordinary process, sec. 32, pp. 203, 204
in an action, may be waived by a party, sec. 32, pp. 205, 206
what necessary to constitute due process of law, sec. 33, pp. 211–214
when judgment may be entered without, sec. 33, pp. 212, 213
when law itself is notice, sec. 33, p. 213
necessary in eminent domain, sec. 33, p. 213
when court acts on discretion, without evidence, not necessary, sec. 33, p. 213
personal, within the state, when necessary, sec. 33, p. 214
general, to all persons when sufficient, sec. 33, p. 214
when not necessary before action taken against property, sec. 33, p. 220
assessments for public improvements and taxes, what necessary, sec. 33, p. 221
must be authorized by law or is no notice, sec. 36, p. 248
constructive, defined, sec. 38, p. 266

Notice—*Continued.*
when and how given, sec. 38. (See CONSTRUCTIVE SERVICE OF PROCESS.)
constructive may be substitute for personal, when, sec. 38, p. 267
necessity for, in attachment, sec. 74, pp. 538, 539
in garnishment, sec. 75, pp. 548, 550
necessary in proceedings for sale of real estate, sec. 76, p. 563
necessary in arbitration, sec. 77, pp. 574, 578
and of motion for new trial, sec. 84, p. 674
and in appeals, sec. 88, p. 732

O

Officer—
of one court exceeding his writ may be sued for trespass in another, sec. 17, p. 69
but property taken by, can not be recovered in any court other than that from which the writ runs, sec. 17, p. 69
return of, effect of, in sustaining jurisdiction, sec. 20, pp. 116, 117; sec. 39, p. 287
appointment of, an executive function, sec. 29, p. 193
but courts and legislatures may appoint their own, sec. 29, pp. 193, 194
to whom summons should be directed, sec. 36, p. 248
by whom service of process must be made, sec. 37, p. 252
authorized to appoint special deputies or bailiffs, sec. 37, pp. 252, 253
power of general deputy appointed by, sec. 37, p. 253
can an officer serve process in his own behalf, sec. 37, p. 255
return of, as basis for publication of constructive notice, sec. 38, p. 279
as proof of service of process and its effect, sec. 39, pp. 287–297 (See SERVICE OF PROCESS.)
return of, may be amended, sec. 39, p. 292
de facto, what is, sec. 60, pp. 379–382
how may be removed from office, sec. 60, p. 383
how and in what courts or tribunals, may be impeached, sec. 71, p. 487
when acts of will be enjoined by court of equity, sec. 79, p. 613
title to office can not be determined by injunction, sec. 79, p. 613

Orders—
for publication, what sufficient, sec. 38, pp. 280, 281
for change of venue, effect of, sec. 51, pp. 348–352
what judges may make at chambers, sec. 58, p. 372–376
what may make in vacation, sec. 59, pp. 376–378

Order for publication. (See CONSTRUCTIVE SERVICE OF PROCESS.)
what sufficient, sec. 38, pp. 280, 281

Original Jurisdiction. (See APPELLATE JURISDICTION; JURISDICTION.)
defined, sec. 9, p. 28, note 1; sec. 21, p. 97
court may have appellate and, sec. 21, p. 98

Original Writ (See PROCESS.)
common law action was commenced by, sec. 35, p. 234
issued out of chancery, sec. 35, p. 234
defined, sec, 35, p. 234
was the foundation of the action, sec. 35, p. 235
other writs following and objects of, sec. 35, p. 235
means of enforcing obedience to, sec. 35, p. 236
has become obsolete, sec. 35, p. 236

Pardons—
effect of on judgment of court, sec. 90, p. 742
power is not judicial, sec. 90, p. 742
is an executive power, sec. 90, p. 742
defined, sec. 90, p. 742
includes power to reprieve, sec. 90, p. 743
but not of commutation, sec. 90, p. 743
in whom vested, sec. 90, p. 743
given by constitution can not be taken away by statute, sec. 90, p. 743
can not be exercised by legislature, sec. 90, p. 743
generally withheld in cases of impeachment and treason, sec. 90, p. 744
at what stage of proceedings may be exercised, sec. 90, p. 744
can not be enforced against consent of party to be benefited, sec. 90, p. 744
conditional, effect of, sec. 90, p. 754
once granted can not be revoked except conditional and condition broken, sec. 90, p. 744
power to recommit for violation of conditional, by whom and how exercised, sec. 90, p. 745
notice of hearing to recommit when necessary, sec. 90, p. 745
statutes authorizing deductions for good behavior not infringement of pardoning power, sec. 90, p. 745
procured by fraud is void, sec. 90, p. 745

Parties—
acts of can not divest court of jurisdiction, sec. 24, p. 155
change of residence of, after suit brought, does not affect jurisdiction, sec. 24, p. 155
actions affecting *status* of, constructive notice allowed, sec. 38, p. 270
death of while publication pending, effect of, sec. 38, p. 284
new parties, when must be served with process, and how, sec. 42, p. 305
death of, when, new parties must be made, sec. 42, p. 307
made by cross.complaint when service of process necessary, sec. 44, p. 324
how service made, sec. 44, p. 324
whether ward necessary in proceeding by guardian for sale of real estate, sec. 76, p. 564
or heir to proceeding by executor or administrator, sec. 76, p. 564
who necessary on appeals, sec. 88, p. 733

Partition—
general principles affecting sale of real estate in proceedings for, sec. 76, p. 572

Partners—
how served with process, sec. 37, p. 263

Perpetuation of Testimony—
a branch of equity jurisdiction, sec. 6, p. 25
how far superseded by statutory provisions for taking testimony, sec. 9, p. 27; sec. 18, pp. 74–81

Personal Actions—
jurisdiction in, how obtained, sec. 11, p. 31
are transitory, sec. 12, p. 35
must be brought where defendant resides, sec. 12, p. 35

Personal Actions—*Continued.*
exceptions in case of corporations, sec. 12, p. 35
sometimes where defendant is found, sec. 12, p. 35
courts may entertain between where parties non-residents, sec. 12, p. 35
but not bound to do so, sec. 12, p. 35
when may be brought in any county, sec. 12, p. 36
in divorce cases brought where plaintiff resides, sec. 12, p. 36
court in which action brought not having jurisdiction of, appellate court has not, sec. 12, p. 36
personal service within the state necessary in, sec. 33, p. 214; sec. 38, p. 267
can not be maintained on constructive service, sec. 38, p. 267
whether proceedings by executor or guardian to sell real estate is, sec. 76, p. 565

Personal Judgment—
can not be rendered against non-resident on constructive notice, sec. 13, p. 42
must be personal service within state, to authorize, sec. 13, p. 42
personal service of notice within the state necessary to authorize, sec. 33, p. 214
may states authorize against its own citizens without, sec. 33, pp. 214, 215
defined, sec. 38, p. 268
can not be rendered on constructive notice, sec. 38, p. 267

Personal Service. (See SERVICE OF PROCESS.)
of writ, how made, sec. 37, p. 262
out of the state is constructive, sec. 38, p. 286
when allowed, sec. 38, p. 286
proof of, how made, sec. 39, p. 287

Petition—
to inferior court, what must show to give jurisdiction, sec. 23, p. 126
effect of allegations in, as against recitals in record, sec. 23, p. 126
filing of, when gives jurisdiction without notice, sec. 38, pp. 280, 281
for sale of real estate is foundation of jurisdiction, sec. 76, p. 558
what should contain, sec. 76, pp. 558, 559, 561

Pleadings. (See COMPLAINT; COURTS; DEFAULT; JUDGMENTS; JURISDICTION.)
judgment rendered without pleading or other statement, void, sec. 8, p. 23
amendment of complaint after publication, effect of on judgment by default, sec. 8, p. 22
may be waived by parties, how, sec. 12, p. 33
by agreed statement of facts, sec. 12, p. 33
of plaintiff, controls in determining jurisdiction as to amount, sec. 16, pp. 59, 64
amount alleged not always conclusive, sec. 16, pp. 59, 63
more than one count, what the rule, sec. 16, p. 59
what part of pleading determines amount, sec. 16, pp. 59, 66
account filed as pleading, footing controls, sec. 16, p. 60
verdict, when controls pleading as to amount in controversy, sec. 16, p. 60
counterclaim and set-off, effect of as to jurisdictional amount, sec. 16, pp. 61, 63
to merits, is an appearance and waives service of process, sec. 34, p. 227

Pleadings—*Continued.*
and waives pending objection to jurisdiction, sec. 34, p. 227
and withdrawal of, does not affect question, sec. 34, p. 227
amendment of, by making new parties, when service of process necessary, sec. 42, p. 305

Plea in Abatement—
when question of jurisdiction may be raised by, sec. 22, pp. 106, 109
strictly a plea to the jurisdiction, sec. 22, p. 109
when proper in attachment proceedings, sec. 74, p. 545

Pleas to the Jurisdiction—
when question of jurisdiction may be raised by, sec. 22, p. 109

Police Power—
how far may be exercised without taking property without due process of law, sec. 33, p. 221

Presumptions—
when jurisdiction of court will be presumed, sec. 12, p. 32; sec. 22, p. 116; sec. 23, pp. 123, 144; sec. 25
will establish jurisdiction without other proof, sec. 23, pp. 123, 124
no presumption, facts necessary to show jurisdiction must be proved, sec. 23, p. 123
in case of domestic judgment conclusive, of foreign *prima facie*, sec 23, pp. 123, 124, 125, 141, 144; sec. 26, p. 169
presumption that law of another state same as one where question arises, sec. 23, p. 124
must prove court of another state one of general jurisdiction to get benefit of presumption, when, sec. 23, p. 125
may be overcome by proof, sec. 23, pp. 127–140
court of general jurisdiction acting specially, no presumption, sec. 23, pp. 142, 144; sec. 25
jurisdiction of inferior courts not presumed, sec. 23, pp. 142, 143, 144
general rule as to presumptions, sec. 25, p. 155
difference respecting, between courts of general and of special jurisdiction, sec. 35, p. 156
as to court of general jurisdiction acting specially, sec. 25, pp. 156, 157
can not prevail against the record, sec. 25, pp. 157, 163
in case of constructive service, sec. 25, pp. 159, 160, 161
in case of domestic court, what presumed, sec. 25, pp. 162, 163
of federal courts, sec. 25, p. 162
difference between domestic and foreign judgments, as to effect of, sec. 25, p. 163
can be indulged only when record is silent, sec. 25, p. 163
in case of defective service, sec. 25, p. 164
that jurisdiction once obtained was properly exercised, sec. 25, pp. 166, 167
in case of judgment by default, sec. 25, pp. 167, 168
that real estate within jurisdiction, sec. 25, p. 168
as to inferior court when jurisdiction has attached, sec. 25, p. 168
in favor of service of process, sec. 37, pp. 254, 255
as affecting proof of service of process, sec. 39, p. 295
that new parties by amendment were served with process, sec. 42, p. 306
that judge acting out of jurisdiction had authority to act, sec. 57, p. 371
that special judge was regularly appointed, sec. 61, p. 389
that was intention of legislature that common law should prevail, sec. 65, p. 424

Presumptions—*Continued.*
in favor of jurisdiction in attachment proceedings, sec. 74, p. 547
in sales of real estate, sec. 76, pp. 554, 555, 561

Probate Jurisdiction—
formerly exercised by what courts, sec. 67, p. 431
in what court now in England, sec. 67, p. 431
in this country in what courts vested, sec. 67, p. 432
now regulated by constitutions and statutes, sec. 67, p. 432
broader than that exercised by ecclesiastical courts, sec. 67, p. 432
vested in courts of general jurisdiction, usually held to be separate and distinct, sec. 67, pp. 432, 433
no distinctively probate courts except in name, sec. 67, p. 433
standing of courts exercising, whether of superior or limited jurisdiction, sec. 67, pp. 433–435
generally held to be of limited but not technically inferior, sec. 67, pp. 433, 434
presumptions in favor of proceedings of, sec. 67, p. 434
recital in record showing jurisdiction, effect of, sec. 67, pp. 434, 435
distinction between common law, equity, and statutory jurisdiction does not exist in reason, sec. 67, p. 435
held in some cases to be inferior courts, sec. 67, p. 435
in others, that proceedings not conclusive, sec. 67, p. 436
held to possess power to set aside judgments rendered by them, sec. 67, p. 436
cases turn upon language of constitutions and statutes as to standard of court, sec. 67, p. 437
incidental powers whether courts possess or not, sec. 67, p. 437
authority to grant letters of administration sometimes granted to clerk of court, sec. 67, p. 437
but his acts in granting are ministerial, sec. 67, p. 437
and no presumptions in favor of, sec. 67, p. 437
but letters granted by court conclusively presumed facts authorizing existed, sec. 67, p. 437
letters themselves conclusive evidence that were rightly issued as against collateral attack, sec. 67, p. 437
sometimes held to be *prima facie* evidence, sec. 67, p. 437
some states statutes make letters conclusive, sec. 67, pp. 437, 438
but such statutes declare the otherwise existing rule, sec. 67, p. 438
doctrine of conclusiveness extends to other proceedings, sec. 67, p. 438
but not when obtained by fraud, sec. 67, p. 438
and sometimes confined to final decrees or orders, sec. 67, p. 438
court, in final accounting, may correct mistake in prior proceedings, sec. 67, p. 438
decree settling final account and discharging executor conclusive until reversed, sec. 67, p. 438
grant of letters can not be avoided collaterally for incompetency of applicant, sec. 67, pp. 438, 439
grant of jurisdiction in "all probate matters," what included in, sec. 67, pp. 439–445
court of probate defined, sec. 67, p. 439
general statement of powers of, sec. 67, pp. 440, 441
does not extend to controversies between estate and third parties not claiming under estate, sec. 67, p. 440
or where right depends upon question over which has no jurisdiction, sec. 67, p. 441
when may pass upon question of title to real estate, sec. 67, p. 441

Probate Jurisdiction—*Continued.*
and as to legitimacy of children, sec. 67, p. 441
may distribute to third party claiming under heir, sec. 67, p. 441
over wills, extent of jurisdiction, sec. 67, p. 442
when extends to validity and construction of, sec. 67, p. 442
estates of infants and persons of unsound mind when have jurisdiction over, sec. 67, p. 442
formerly belonged to courts of chancery, sec. 67, p. 442
and in probate courts controlled by equity rules, sec. 67, pp. 442, 443
distinction between guardians appointed by court and testamentary guardians, sec. 67, p. 443
effect of existing testamentary guardianship over power to appoint, sec. 67, p. 443
appointment of guardian in another state does not affect, sec. 67, p. 443
of settlement of estates formerly in chancery, sec. 67, p. 443
how grew up, sec. 67, p. 443
in some states, concurrent in chancery and probate courts, sec. 67, pp. 443, 444
extent of jurisdiction of courts of chancery in such cases, sec. 67, p. 444
wholly denied in some cases where probate court exists, sec. 67, p. 444
other cases hold is a part of grant of general equity jurisdiction by constitution and can not be made exclusive in probate court, sec. 67, p. 445
may interpose where probate court incapable of giving relief, sec. 67, p. 445
common law or equity jurisdiction may be conferred on probate courts, sec. 67, pp. 445, 446
cases to the contrary, sec. 67, p. 445
when construction of will peculiarly within chancery jurisdiction, sec. 67, pp. 446, 447
courts of equity no jurisdiction to order sale of legal title to real estate of infant, sec. 67, p. 447
when and to what extent probate court held to be court of equity, sec. 67, p. 447
in some states, have broad power to deal with trusts and matters of account, sec. 67, pp. 447, 448
but must arise in settlement of estates, sec. 67, p. 448
court of chancery no jurisdiction over purely probate matters as part of general equity powers, sec. 67, p. 448
formerly belonged in England to ecclesiastical courts, sec. 67, p. 448
and passes by general grant of probate jurisdiction, sec. 67, p. 448
grant of common law and equity jurisdiction does not include, sec. 67, pp. 448, 449
powers of equity and probate courts depend upon constitutions and statutes in different states, sec. 67, p. 449
difference in extent of powers in different states, sec. 67, pp. 449, 450
general equity jurisdiction in federal courts in settlement of estates can not be taken away or limited by state laws, sec. 67, p. 450
exclusive jurisdiction vested in probate court does not affect, sec. 67, p. 450
nor that property is being administered in state court, sec. 67, p. 450

Probate Jurisdiction—*Continued.*
nor can right to sue administrator or executor in be taken away, sec. 67, p. 451
extent of jurisdiction of federal courts, sec. 67, p. 451
of probate depends upon
death of owner of the estate,
and generally upon domicile of deceased at time of death,
or presence of property of deceased within jurisdiction, sec. 67, pp. 452, 453
whether property must have been within jurisdiction at time of death, sec. 67, p. 452
general rules as to place where proceedings must be commenced, sec. 67, pp. 452, 453
when court first assuming jurisdiction has exclusive, sec. 67, p. 453
death of owner of estate, finding of by court does not give jurisdiction, sec. 67, p. 453
if owner not dead, proceedings void, sec. 67, p. 453
as to domicil and presence of property, are questions of fact and finding conclusive, sec. 67, p. 453
but held otherwise in some states, sec. 67, pp. 453, 454
when letters revoked on direct attack, sec. 67, p. 454
jurisdictional facts found, not void, sec. 67, p. 454
letters granted by interested judge, void, sec. 67, p. 454
what petition in probate proceeding must show as to jurisdictional facts, sec. 67, p. 454
distinction made between superior and inferior courts in this respect, sec. 67, p. 454
effect where statute provides failure to allege shall not be taken advantage of, except on appeal, sec. 67, pp. 454, 455
finding that applicant for letters has necessary qualifications, conclusive, sec. 67, p. 455
letters granted to stranger before time limited for application by relatives held void, sec. 67, p. 455
court granting letters, jurisdiction of, not necessarily exclusive as to all matters connected with estate, sec. 67, p. 455
petition for sale of real estate may be filed in court of other county, when, sec. 67, p. 455
contest of will, necessity of alleging jurisdictional facts, sec. 67, pp. 455, 456
proof of facts obviate failure to allege, sec. 67, p. 456
letters on same estate may be granted in different states, sec. 67, p. 456
powers of respective administrators, sec. 67, p. 456
grant of letters of administration where will exists, how may be attacked, sec. 67, p. 456
letters granted in one state have no force in another, sec. 67, p. 456
power of administrator to sue in another state, sec. 67, p. 456
probate of will conclusive in state where granted, sec. 67, p. 457
is proceeding *in rem* and binds all the world, sec. 67, p. 457
rule as to conclusiveness at common law, sec. 67, p. 457
probate not proof of execution of will according to laws of another state, sec. 67, p. 457
proves validity only so far as affects property within the state, sec. 67, p. 457
whether probate court may vacate its own order of probate, sec. 67, pp. 457, 458
generally held it may, sec. 67, p. 458

Probate Jurisdiction—*Continued.*
power to revoke incidental to jurisdiction to grant letters, sec. 67, p. 458
when court of chancery may set aside judgment of probate court, sec. 67, p. 458
power of chancery to set up lost, destroyed, or suppressed will, sec. 67, p. 458
power generally denied on ground is strictly probate jurisdiction, sec. 67, p. 458
contest of wills, extent of jurisdiction in case of, sec. 67, p. 459
only question will or no will, court can not construe, sec. 67, p. 459
notice to heirs and parties interested necessary, sec. 67, p. 459
will can not be granted before death of testator, sec. 67, p. 459
no law authorizing probate at time of death, can not be probated under subsequent statute, when, sec. 67, p. 459
probate of will not necessary to validity of, unless made so by statute, sec. 67, pp. 459, 460
general rule finding of notice conclusive, sec. 67, p. 460
power to appoint guardian usually confined to minors, etc., residing within jurisdiction, sec. 67, p. 460
but may be extended by law to non-residents, sec. 67, p. 460
order final distribution terminates jurisdiction, sec. 67, p. 460
and is conclusive against collateral attack, sec. 67, p. 460
probate within county, but not at county seat, not void, sec. 67, p. 460
general rules as to necessity of notice applies to probate proceedings, sec. 67, p. 460
necessary, though not required by statute authorizing proceeding, sec. 67, p. 460

Proceedings in rem. (See ATTACHMENT.)
jurisdiction in, how obtained, sec. 14, p. 44
personal service on defendant not necessary to give jurisdiction, sec. 14, p. 44
jurisdiction acquired by seizure of property, sec. 14, p. 44
in order to be effectual, must be followed by notice, sec. 14, p. 45
in some states notice sufficient without seizure, sec. 14, p. 45
failure to give notice does not deprive court of jurisdiction or render judgment void. sec. 14, p. 45
failure to give notice can only be taken advantage of on appeal, sec. 14, p. 45
but otherwise where property not levied upon, sec. 14, p. 45
levy of writ necessary in attachment, sec. 14, p. 45
seizure of property not necessary in actions to enforce specific liens, sec. 14, p. 46
in such cases presence of property gives jurisdiction, sec. 14, p. 46
notice to defendant necessary in attachment proceedings, sec. 14, p. 48
control of property must be maintained or jurisdiction lost, sec. 14, p. 47
personal service on non-resident gives jurisdiction, sec. 14, p. 48
where action is for debt, power of court limited to application of property to its satisfaction, sec. 14, p. 48
complaint amended new notice necessary, sec. 14, p. 49
only rights of parties notified affected, sec. 14, pp. 49, 50
proceeding purely *in rem* general notice sufficient, sec. 14, p. 50
constructive notice when allowed, sec. 14, p. 50; sec. 38, p. 267
personal service out of state is constructive, sec. 14, p. 50

Proceedings in rem—*Continued.*
provisional remedies against property to satisfy debt unknown to common law, sec. 14, p. 50
manner of giving notice statutory, sec. 14, p. 51
provisions for constructive notice must be strictly pursued, sec. 14, p. 51
losing custody of property deprives court of jurisdiction, sec. 24, p. 154
failure to give notice in deprives court of jurisdiction, sec. 24, p. 154
application of guardian or administrator for sale whether is, sec. 41, p. 303
whether statutes requiring application for change of venue if action brought in wrong county apply to, sec. 46, pp. 429–431
when attachment is, sec. 74, p. 519

Proceeding Supplementary to Execution—
has superseded equity jurisdiction of courts of equity in aid of enforcement of common law judgments, sec. 18, p. 75

Process. (See Jurisdiction; Service of Process; Due Process of Law; Summons; Subpena.)
of courts of one state can not extend into another state without consent, sec. 15, pp. 51, 53
state may prescribe what shall issue as between its own citizens, sec. 15, p. 52
of court of a county may be made to extend over state, sec. 15, p. 52
of one court will not be controlled by another of concurrent jurisdiction, sec. 79, p. 609
nature and different kinds of, sec. 35
original, difference between at common law and under codes, sec. 35, p. 234; sec. 36, p. 239
defined, sec. 35, p. 234
at common law, action commenced by original writ, sec. 35, p. 234
original writ defined, sec. 35, p. 234
was the foundation of the suit, sec. 35, p. 235
was followed by *summons*, *attachment* and *distringas*, to compel obedience, sec. 35, p. 235
in equity first process a *subpena*, sec. 35, p. 235
subpena defined, sec. 35, p. 235
other writs issued to compel appearance, sec. 35, p. 235
objects of common law and equity writs to *compel* appearance, sec. 35, p. 236
common law writs proceeded against property, sec. 35, p. 236
equity writs operated upon the person, sec. 35, p. 236
but property sequestered by court of equity, when, sec. 35, p. 236
under civil and ecclesiastical law personal citation issued, sec. 35, p. 236
called monition and adopted by admiralty courts, sec. 35, p. 236
process under present practice not to *compel* attendance but to give *opportunity* to attend, sec. 35, p. 236
penalty for failure to attend is judgment by default, sec. 35, p. 236
common law and equity writs to compel appearance obsolete, sec. 35, p. 236
superseded by writ of summons, sec. 35, p. 236
summons defined, sec. 35, pp. 236, 237
in some of the states is a mere notice not issuing out of court, sec. 35, p. 237
but its object is the same, sec. 35, p. 237

Process—*Continued.*
sometimes denominated a *citation* or *notice*, sec. 35, p. 237
subpena still in use in federal and some state courts, sec. 35, p. 237
but sometimes modified in form, sec. 35, p. 238
in many proceedings, as in matters of probate, *notice* provided for, sec. 35, p. 238
in federal courts *monition* of the civil law still in use, sec. 35, p. 238
may be general to all persons, or special to individuals named, or mixed containing special directions to all persons and special summons to particular persons, sec. 35, p. 238
citation defined, sec. 35, p. 238
does not differ materially from summons, sec. 35, p. 238
all original process in the several states essentially the same, sec. 35, p. 238
changes made in original process in England, sec. 35, p. 238
provision usually made for publication when personal service can not be had, sec. 35, p. 239
of what publication consists, sec. 35, p. 239
notice required in appellate courts, sec. 35, p. 239
requisites of process, sec. 36
importance of form under common law practice, sec. 36, p. 239
at present day, is of little consequence, sec. 36, p. 239
objects of, sec. 36, p. 239
general requisites of, sec. 36, pp. 239, 240
must conform substantially to requirements of statute, sec. 36, p. 240
defective, when sufficient to give jurisdiction, sec. 36, p. 240
certainty required in, sec. 36, p. 241
name of person to be summoned must appear in, sec 36, p. 241
variance in name, when will not vitiate, sec. 36, p. 241
to whom must be directed, sec. 36, p. 241
authorized to issue to certain officer, if another officer disqualified, disqualification must exist, sec. 36, p. 241
when form of, depends upon nature of action, sec. 36, p. 242
effect of variance between summons and complaint, sec. 36, pp. 242, 243
which controls, complaint or summons, sec. 36, p. 242
when variance will be presumed to have worked injury, sec. 36, p. 242
when statute fixing form held to be mandatory, and summons fatally defective, sec. 36, p. 243
distinction between cases where clerk enters default and where relief is asked of court, as to effect of variance, sec. 36, pp. 243, 244
literal compliance with statute not necessary, sec. 36, p. 244
general statement of cause of action sufficient, sec. 36, p. 245
clerk of one court can not issue returnable in another court unless expressly authorized, sec. 36, p. 245
signature of clerk necessary, sec. 36, p. 245
except when authorized to be signed by plaintiff or his attorney, sec. 36, p. 245
printed signature sufficient, sec. 36, p. 245
how must be tested, sec. 36, p. 245
teste matter of form and may be amended, sec. 36, p. 246
must bear seal of court, sec. 36, p. 246
but may be amended by attaching seal, sec. 36, pp. 245, 246
even after judgment, sec. 36, p. 246
such summons defective, but not void, sec. 36, p. 246

Process—*Continued.*
but as to this the authorities are conflicting, sec. 36, pp. 246, 247
failure to comply with requirement that shall run in name of state, renders irregular but not void, sec. 36, p. 247
issuance of, is ministerial act, sec. 36, p. 247
and clerk may issue in action in his own behalf, sec. 36, pp. 247 248
but can it be issued to sheriff or other officer in his own action? sec. 36, p. 248
effect of service by one officer of writ directed to another, sec. 36, p. 248
notice must be authorized by law or is no notice, sec. 36, p. 248
summons issued on Sunday, when will be upheld, sec. 36, p. 249
when summons may issue, sec. 36, p. 249
generally after complaint filed, sec. 36, p. 249
and if issued before, is void, sec. 36, p. 249
different rule in some states, sec. 36, p. 249
alias summons, when may issue, sec. 36, p. 249
return day, what is, sec. 36, p. 249
time when made returnable affects validity, when, sec. 36, pp. 249, 250
must be returnable on day required by statute, sec. 36, p. 250
made returnable on legal holiday not void, sec. 36, p. 250
but will be returnable first judicial day thereafter, sec. 36, p. 250
made returnable for wrong hour in the day, effect of, sec. 36, p. 250
failure to indorse name of attorney for plaintiff on, effect of, sec. 36, pp. 250, 251
when summons aided by complaint attached, sec. 36, p. 251
service of process, sec. 37, p. 251
governed by statute, sec. 37, p. 251
statutes of different states substantially the same as to material matters, sec. 37, p. 251
but differ as to matters of form, sec. 37, p. 251
purpose and object of such statutes, sec. 37, p. 251
due service necessary to give jurisdiction, sec. 37, p. 252
by whom may be made, sec. 37, p. 252
generally by officers designated by statute, sec. 37, p. 252
but may be by private individuals when authorized by law, sec. 37, p. 252
when by special deputies, sec. 37, p. 252
distinction between general and special deputies as to power to serve, sec. 37, p. 253
power of special limited to county covered by appointment, sec. 37, p. 253
so when limited to service of particular writ, sec. 37, p. 253
but service not void where could serve as private individual, sec. 37, p. 253
but proof of such service must be by affidavit and not by return, sec. 37, p. 253
appointment of special bailiff without seal, effect of, sec. 37, p. 254
failure to indorse appointment on writ, effect of, sec. 37, p. 254
power of constable to appoint deputy, and powers of, sec. 37, p. 254
sheriff can not serve out of his county, sec. 37, p. 254
nor can private individual, sec. 37, p. 254
direction of writ to wrong officer, effect of, sec. 37, pp. 254, 255

Process—*Continued.*
rule where proper officer is claimed to be disqualified, sec. 37, p. 255
effect of service by private individual, sec. 37, p. 255
general rule that officer can not serve process in his own case, sec. 37, p. 255
but held in some cases rule not applicable to summons, sec. 37, p. 255
and this is the better rule, sec. 37, p. 255
only objection to such service is liability to false return, sec. 37, p. 256
where statute provides for service by disinterested person service by interested party void, sec. 37, p. 256
conditional authority of court to appoint private individual to serve, conditions must exist or service void, sec. 37, p. 256
but will be presumed if not required to be affirmatively stated in writ, sec. 37, p. 256
otherwise if required to be stated, sec. 37, p. 256
if reasons for appointment not set out, when required, can not be amended after service, sec. 37, p. 256
must appear that private individuals have statutory qualifications, sec. 37, p. 256
indorsement on original, authorizing party to serve, does not authorize service of *alias*, sec. 37, p. 257
when may be served, sec. 37, p. 257
generally, not before filing of complaint, sec. 37, p. 257
nor after return day, sec. 37, p. 257
alias must issue in such case, sec. 37, p. 257
held may be dated, issued, and returned on return day, sec. 37, p. 257
service on return day voidable, not void, sec. 37, p. 257
where may be served, sec. 37, p. 257
not beyond territorial jurisdiction of court issuing, sec. 37, p. 257
unless expressly authorized, sec. 37, pp. 257, 258
but service out of jurisdiction may be authorized by statute, sec. 37, p. 258
service out of county usually provided for, sec. 37, p. 258
and sometime out of state, sec. 37, p. 258
non-resident temporarily within state may be served, sec. 37, p. 258
exceptions where in attendance at court as party or witness or going or coming, sec. 37, p. 258
must have reasonable time to return to his state, sec. 37, p. 258
some cases hold exemption only applies attendance under writ involving arrest, sec. 37, p. 259
but weight of authority the other way, sec. 37, p. 259
extends to persons attending before officer to give deposition, sec. 37, p. 259
but not where deposition to be used in another state, sec. 37, p. 259
immunity does not depend upon statute, sec. 37, p. 259
nor upon citizenship, sec. 37, p. 259
applies to resident of state attending out of his county, sec. 37, pp. 259, 260
but sometimes held service on resident out of county not void, but entitles to change of venue, sec. 37, p. 259
distinction between resident and non-resident in case of arrest, sec. 37, p. 259
exception extends to one induced to come within jurisdiction by fraud, sec. 37, pp. 260, 261

Process—*Continued.*
rule applies to officers of corporation, sec. 37, p. 261
member of congress privileged while in attendance at session and going and returning, sec. 37, p. 261
deviation from direct route, effect of, sec. 37, p. 261
rule applies to members of legislature, sec. 37, p. 261
in some cases confined to process involving arrest, sec. 37, p. 261
but better rule extends it to civil process not involving arrest, sec. 37, p. 261
question of privilege, how raised, sec. 37, p. 261
what necessary to authorize service on joint defendant residing out of county, sec. 37, p. 261
resident defendant must have real interest adverse to plaintiff, sec. 37, pp. 261, 262
defective service, how question of raised, sec. 37, p. 262
distinction between void and defective, as to time and manner of raising objection, sec. 37, p. 262
how may be served, sec. 37, p. 262
personal service generally required, sec. 37, p. 262
what will constitute personal service, sec. 37, p. 262
leaving copy at place of residence, what necessary, sec. 37, pp. 262, 263
strict compliance with statute required, sec. 37, p. 262
summons for wife, leaving copy with husband, effect of, sec. 37, p. 262
generally copy of complaint must be served with, sec. 37, p. 263
when required service of such copy necessary to give jurisdiction, sec. 37, p. 263
where certified copy required, copy not certified insufficient, sec. 37, p. 263
service on partners, what sufficient, sec. 37, p. 263
variance between copy served and original, effect of, sec. 37, p. 264
service on minors, what necessary, sec. 37, p. 264
on insane persons, sec. 37, p. 265
on married women, sec. 37, p. 265
on persons acting in official capacity, sec. 37, p. 266
constructive service of process, sec. 38
meaning of, sec. 38, p. 266
includes personal service out of state, sec. 38, p. 266
is exceptional mode of service, sec. 38, p. 266
statutes authorizing must be complied with, sec. 38, p. 266
division of the subject, sec. 38, p. 266
a. *in what cases allowed*, sec. 38, p. 267
under control of the states, sec. 38, p. 267
general rule personal action can not be maintained on, sec. 38, p. 267
either against resident or non-resident, sec. 38, p. 267
personal judgment, what is, sec. 38, p. 268
allowed in actions *in rem*, and attachment, sec. 38, p. 269
but relief confined to property, sec. 38, p. 269
seizure of property generally necessary, sec. 38, p. 270
and notice, sec. 38, p. 270
allowed in cases to enforce specific liens on property within jurisdiction, sec. 38, p. 270
as in case of mortgage on real or personal property, sec. 38, p. 270
proceedings affecting title to real estate, sec. 38, p. 270
to set aside fraudulent conveyances, sec. 38, p. 270

Process—*Continued.*
actions to quiet title, sec. 38, p. 270
to abate nuisances, sec. 38, p. 270
to establish trusts in real estate, sec. 38, p. 270
in such cases jurisdiction depends upon presence of property, sec. 38, p. 270
and personal judgment can not be rendered, sec. 38, p. 270
allowed in cases affecting *status* of parties, as in divorce, sec. 38, p. 270
but can be no personal judgment on, as for alimony, sec. 38, p. 270
independent of statute, courts can not authorize, sec. 38, p. 271
courts of equity, when may authorize service on other person for non-resident, sec. 38, p. 271
b. *the affidavit*, sec. 38, p. 271
making of, is jurisdictional, sec. 38, p. 271
what must be shown by, sec. 38, pp. 271, 272
may be sufficient to give jurisdiction, but defective and subject to direct attack, sec. 38, p. 272
what must contain governed by statute, sec. 38, pp. 272, 273
but every step required may be taken and yet service be void, when, sec. 38, pp. 272, 273
how fact of non-residence may be established, sec 38, p. 273
facts required to be stated in, can not be supplied by other evidence, sec. 38, p. 273
held not to be part of judgment roll, sec. 38, pp. 273, 274
and that was made will be presumed, sec. 38, p. 274
must appear from, that case is one for constructive notice, when, sec. 38, p. 274
when complaint may be looked to for cause of action, sec. 38 pp. 274, 275
general statement of cause of action sufficient, sec. 38, p. 275
not always sufficient to follow language of statute, sec. 38, p. 275
diligence to find defendant for personal service, what showing of necessary, sec. 38, pp. 275, 276, 277
facts as to what was done must be stated, sec. 38, p. 275
but any facts tending to show gives court jurisdiction to determine question, sec. 38, p. 275
what constitutes due diligence can not be definitely stated, sec. 38, pp. 275, 276
allegation of property within jurisdiction, how must be made, sec. 38, p. 276
what may be stated on information and belief, sec. 38, p. 276
that defendant is out of state must be positive and direct, sec. 38, p. 276
absence from state, what sufficient, sec. 38, pp. 276, 277
strictness required in stating nature of action, sec. 38, p. 277
name of party to be published against necessary, sec. 38, p. 277
except where defendant may be sued under fictitious name, sec. 38, p. 277
then must be shown that true name is unknown, sec. 38, p. 277
false statement of cause of action in, effect of, sec. 38, p. 277
does not affect jurisdiction of court, sec. 38, p. 278
of non-residence must relate to time of order for publication, sec. 38, p. 278
how near the time must be made, sec. 38, p. 278
need not be made at time complaint is filed, sec. 38, p. 278

Process—*Continued.*
in some states complaint must be filed *after* proof of publication, sec. 38, p. 278
and if filed before judgment, void, sec. 38, p. 278
when affidavit may be amended, sec. 38, p. 279
difficulty of making personal service no ground for publication, sec. 38, p. 279
insufficiency of complaint not ground for attacking notice sec. 38, p. 279
c. *officers return as basis for jurisdiction*, sec. 38, p. 279
facts necessary for, when may be shown by, sec. 38, p. 279
what must be shown by, sec. 38, p. 279
d. *order of publication*, sec. 38, p. 280
must require all acts to be done that statute requires, sec. 38, p. 280
is the authority for making the service, sec. 38, p. 280
and proper service without necessary order therefor is void, sec. 38, p. 280
what order must contain, sec. 38, pp. 280, 281
e. *the publication*, sec. 38, p. 281
what must be, governed by statute, sec. 38, p. 281
in some states summons published, sec. 38, p. 281
in others notice containing its substance, sec. 38, p. 281
irregularities do not render void, sec. 38, p. 281
but distinction in this respect between personal and constructive service, sec. 38, pp. 281, 282
publication for less than required time, effect of, sec. 38, pp. 282, 283
rule in cases of petition by guardian for sale of ward's property, sec. 38, p. 283
petition said to give jurisdiction in such cases, sec. 38, p. 283
relief demanded of which notice is given limits jurisdiction to granting such relief, when, sec. 38, p. 284
death of defendant pending publication, new notice necessary, sec. 38, p. 284
where publication measured by month, calendar months meant, sec. 38, p. 284
what is sufficient length of time for publication, sec. 38, p. 284
f. *proof of publication*, sec. 38, p. 284
validity of judgment does not depend upon, sec. 38, p. 284
but upon fact of publication, sec. 38, p. 284
therefore may be supplied after judgment, sec. 38, p. 285
and may be amended, sec 38, p. 285
failure to make is irregularity merely, sec. 38, p. 285
but judgment void on face, right to supply or amend subject to intervening rights, sec. 38, p. 285
facts of publication may be established, how, sec. 38, p. 285
by whom affidavit may be made, sec. 38, p. 285
warning order takes place of summons, and proof the place of officer's return, sec. 38, p. 286
facts, appearing in, by way of recital, effect of, sec. 38, p. 286
after many years slight proof sufficient, sec. 38, p. 286
g. *personal service out of state*, sec. 38, p. 286
is constructive service, sec. 38, p. 286
and allowed on like showing as for publication, sec. 38, p. 286
and usually length of service the same, sec. 38, p. 286
proof of personal service of process, sec. 39
service, not proof of, gives jurisdiction, sec. 39, p. 287
service by officer, proof of by his return, sec. 39, p. 287
by private individual, by his affidavit, sec. 39, p. 287

Process—*Continued.*
but such modes not exclusive, but proof of may be made otherwise, sec. 39, p. 287
but sometimes held can not be by parol, sec. 39, p. 287
and this so where question arises on appeal, sec. 39, pp. 287, 288
facts necessary to show valid service must be shown, sec. 39, p. 288
competency of private individual to serve must be shown, when, sec. 39, p. 288
but failure to show mere irregularity, sec. 39, p. 288
in other respects return and affidavit the same, sec. 39, p. 288
what sufficient to be shown, sec. 39, pp. 288, 289
service of copy of complaint must appear, when, sec. 39, p. 289
and certified copy, sec. 39, p. 289
how writ must be delivered, sec. 39, p. 289
service by mail, what sufficient proof of, sec. 39, p. 289
strictness required where service by leaving copy, sec. 39, p. 290
must show place of service, sec. 39, p. 290
but when will be presumed to have been within jurisdiction, sec. 39, p. 290
failure to give name of party served, service a nullity, sec. 39, p. 290
variance in name in summons and return, effect of, sec. 39, p. 290
action against husband and wife, effect of proof of service on husband, sec. 39, p. 290
proof necessary where service allowed on one person if another not found, sec. 39, p. 291
service how shown by acceptance of, sec. 39, p. 291
by third party, authority must appear, sec. 39, p. 291
can not be made by a minor, or by guardian for him, sec. 39, p. 291
genuineness of signature to acceptance must be shown, when, sec. 39, p. 291
service out of state, what necessary, sec. 39, p. 292
what necessary as to time of service, sec. 39, p. 292
return may be amended even after judgment, sec. 39, p. 292
but subject to intervening rights, when, sec. 39, p. 292
must be upon notice, when, sec. 39, p. 292
found defective on appeal, effect of, sec. 39, p. 293
when verification of return necessary, sec. 39, p. 293
by deputy, must be in name of principal, sec. 39, p. 293
by special deputy, how proof made, sec. 39, p. 293
need not appear that service was by deputy, when, sec. 39, p. 293
effect of return in name of special deputy, sec. 39, p. 294
time when return should be made, sec. 39, p. 294
effect of return, whether conclusive or not, sec. 39, p. 294
proof by private individual may be contradicted, sec. 39, p. 295
defects in return not ground for quashing writ, sec. 39, p. 295
due service when presumed, sec. 39, p. 295
but proof showing insufficient service not aided by presumption, when, sec. 39, p. 295
degree of exactness required in proof, sec. 39, p. 295
distinction between personal and constructive service, sec. 39, pp. 295, 296
question on appeal not necessarily one of jurisdiction, sec. 39, p. 296
jurisdiction should not be allowed to fail for want of formal proof, sec. 39, pp. 296, 297

Process—*Continued.*
defective process and service, sec. 40
distinction between defective and void service, sec. 40, pp. 297, 299
former confers jurisdiction, latter not, sec. 40, p. 297
latter ground for collateral attack, former not, sec. 40, p. 297
proof may be amended, sec. 40, p. 298
when can not be amended after appeal, sec. 40, p. 298
distinction between actual and constructive service as to effect of, sec. 40, pp. 298, 299
waiver of process and service and defects therein, sec. 41
effect of general appearance, sec. 41, p. 300
is equivalent to service, sec. 41, p. 300
persons under disabilities can not waive, sec. 41, p. 300
nor can their guardians, sec. 41, p. 300
exceptions in case of guardians, sec. 41, p. 300
service on minor necessary to authorize appointment of guardian *ad litem*, sec. 41, p. 301
and person appointed can do no act conferring jurisdiction, sec. 41, p. 301
effect of such appointment and appearance, sec. 41, pp. 301, 302
distinction between and failure to appoint where there is service, sec. 41, p. 302
recitals in record binding on minors, sec. 41, p. 302
when service on minor not necessary to give jurisdiction, sec. 41, p. 302
in case of petitions in proceedings not adversary, sec. 41, p. 302
attorney can not waive service on minor, sec. 41, p. 303
receipt of benefits of judgment, effect of as to waiver, sec. 41, p. 303
agreement to waive return of service, effect of, sec. 41, p. 303
summons by wrong name, effect of appearance, sec. 41, p. 303
setting up objections, effect of as waiver of other objections, sec. 41, p. 303
failure to appear and object, effect of, sec. 41, p. 303
time within which objection to defects may be taken, sec. 41, p. 304
relief on account of fraud, sec. 41, p. 304
acceptance of service, effect of as a waiver, sec. 41, p. 304
authority of agent to waive, sec. 41, p. 304
waiver without appearance, how may be done, sec. 41, pp. 304, 305
bringing action in wrong county, how waived, sec. 41, p. 305
appearance and contest of service does not waive right to writ of error, sec. 41, p. 305
of new parties and amended pleadings, sec. 42
when new parties made, how jurisdiction obtained, sec. 42, p. 305
no new service necessary when new parties plaintiff made, sec. 42, p. 305
auxiliary proceedings in equity, service may be made on attorney, when, sec. 42, p. 305
an amendment of complaint where no appearance, when new service necessary, sec. 42, p. 306
new parties, when new service on original parties necessary, sec. 42, p. 306
presumptions in such cases, sec. 42, p. 306
substituted plaintiff, no new process necessary, sec. 42, pp. 306, 307
or where name of plaintiff stricken out, sec. 42, p. 307
in case of death of defendant and substitution of representative or heir, what notice necessary, sec. 42, pp. 307, 308

Process—*Continued.*
when cause pending on writ of error, sec. 42, p. 307
decision after death, relates back, sec. 42, p. 307
on reversal, what necessary in court below in case of death, sec. 42, p. 307
in actions against corporations, sec. 43
manner of making service on, difference between and on natural persons, sec. 43, p. 308
statutes compelling submission of, to service out of state, as condition of doing business, sec. 43, p. 308
constitutionality of such statutes upheld, sec. 43, p. 308
conditions must be reasonable, sec. 43, pp. 308, 309
right to serve in state other than that of its creation wholly statutory, sec. 43, p. 309
right to sue in foreign state not confined to action growing out of business done therein, sec. 43, p. 309
distinction as to corporations acting under interstate commerce law, sec. 43, p. 310
corporation not a citizen within meaning of constitution, sec. 43, p. 310
and state may impose conditions upon which it may do business therein, sec. 43, p. 311
right to trial within county or state of residence a personal privilege and may be waived, sec. 43, p. 311
corporation doing business in state where conditions imposed waives right to be sued elsewhere, sec. 43, p. 311
but can not, independently of such statute, be sued out of its state, sec. 43, pp. 311, 312
upon whom service on may be made, sec. 43, pp. 313–316
as to manner of service, statute must be strictly pursued, sec. 43, p. 316
"station agent," meaning of, sec. 43, p. 316
return of officer as to kind of officer served, effect of, sec. 43, p. 316
service on two officers required, service on one insufficient, sec. 43, pp. 316, 317
"general agent" and "managing agent," meaning of, sec. 43, pp. 317, 318
may be sued in any county, sec. 43, p. 318
agent or officer can not be served outside of territory he represents, sec. 43, pp. 318, 319
or outside of county in which public corporation is situated, sec. 43, p. 319
service on officer in foreign state, must be at the time acting for the corporation in such state, sec. 43, p. 319
service may be on mere clerk if statute authorizes, sec. 43, p. 319
what will amount to such doing business as to authorize service in foreign state, sec. 43, pp. 319, 320
presence of officers alone will not authorize, when, sec. 43, p. 320
service by publication may be had, when, sec. 43, p. 321
when may be sued in state of residence of either plaintiff or defendant, sec. 43, p. 322
sometimes right to serve depends upon presence of property within jurisdiction, sec. 43, p. 322
in federal court, law of state in which court held controls, when, sec. 43, pp. 322, 323
different rule as to service where corporation created by act of congress, sec. 43, p. 323

Process—*Continued.*
may be sued in any state where is doing business, sec. 43, p. 323
doing business in another state does not change place of citizenship, sec. 43, pp. 323, 324
where cross-complaint is filed, sec. 44
new parties brougnt in by, must be served, sec. 44, p. 324
but if against parties before the court, not necessary, sec. 44, p. 324
when party must take notice of all pleadings filed, sec. 44, p. 324
when service is not necessary in case of default under original complaint, sec. 44, p. 324
when service of pleading, without summons, sufficient, sec. 44, p. 324
stranger coming in and setting up cause of action, summons must issue, sec. 44, p. 325
in equity, service may be made on attorney, sec. 44, p. 325

Prohibition—
question of jurisdiction may be raised by, sec. 22, p. 112
formerly a common law writ, sec. 81, p. 627
now almost wholly statutory, sec. 81, p. 627
object of to restrain judicial tribunals from acting without or in excess of their jurisdiction, sec. 81, pp. 628, 629
extent of jurisdiction under statutes, sec. 81, p. 628
general nature of writ same as at common law, sec. 81, p. 628
jurisdiction to issue given by constitution means common law writ, sec. 81, p. 629
statute extending to ministerial acts upheld, sec. 81, p. 529
is preventive writ and can not issue after act done, sec. 81, p. 629
can not issue to prevent commencement of action, sec. 81, p. 629
further action may be restrained at any stage, sec. 81, p. 629
may issue after judgment to prevent enforcement, sec. 81, p. 629
acts partially completed will annul what has been done and prevent completion, sec. 81, pp. 629, 630
lies where lower court has been deprived of jurisdiction, sec. 81, p. 630
power to issue belongs to superior courts only, sec. 81, p. 630
when may issue by supreme court of United States, sec. 81, p. 630
and by other federal courts, sec. 81, p. 631
in what sense is extraordinary writ, sec. 81, p. 631
kind of remedy by ordinary proceeding that will prevent its issuance, sec. 81, pp. 631, 632, 636
usually denominated a prerogative writ, sec. 81, p, 631
but treated generally as writ of right, sec. 81, p. 631
but sometimes held to issue only at discretion, sec. 81, p. 631
is jurisdictional writ, sec. 81, pp. 631, 632
will not issue to correct errors, sec. 81, pp. 631, 632
right to *certiorari* or appeal, when will defeat writ, sec. 81, pp. 632, 633, 636
delay in enforcement of other remedies, effect of, sec. 81, pp. 632, 633
question of jurisdiction must be presented to lower court first, sec. 81, p. 633
but failure to raise question below not absolute bar, sec. 81, pp. 633, 634
will lie for want of jurisdiction of the person, sec. 81, p. 634
distinction between want or excess of jurisdiction, and error, sec. 81, pp. 634, 635
not confined to inquiry as to jurisdiction of general subject-matter, sec 81, pp. 635, 636

Prohibition—*Continued.*
where question upon sufficiency of service, effect of finding of lower court, sec. 81, p. 636
different rule where no service, or service could not give jurisdiction if made, sec. 81, p. 636
when right to change of venue speedy and adequate remedy, sec. 81, pp. 636, 637
service procured by fraud or when privileged writ will issue, sec. 81, pp. 636, 637
appellate courts, power of, to issue, sec. 81, p. 637
whether appeal will lie from order refusing, sec. 81, pp. 637, 638
power of judges at chambers, sec. 81, p. 638
proper remedy to prevent action by disqualified judge, sec. 81, p. 638

Proof—
of jurisdiction, how made, sec. 23, p, 122–145
of publication, what must be, sec. 38, pp. 284–286
of personal service, how made, sec. 38, p. 287
defective service of process, effect of, sec. 40, pp. 297–299
of service of process in attachment, sec. 74, p. 541

Property—
value of, what is meant by as affecting jurisdiction, sec. 16, p. 63
in action to quiet title value of determines jurisdiction as to amount, sec. 16, p. 62
and in actions to set aside fraudulent conveyances, sec. 16, p. 62
taking of by eminent domain, notice necessary, sec. 33, p. 213
within jurisdiction of court when constructive notice allowed, sec. 33, p. 219; sec. 38, pp. 267, 268
when notice not necessary before action taken against, sec. 33, p. 220
but jurisdiction only extends to the property, sec. 38, p. 268
of one defendant in state gives no jurisdiction as against another defendant, sec. 38, p. 269
seizure of gives jurisdiction of, sec. 38, p. 270
must be within jurisdiction in garnishments, sec. 75, p. 552

Publication. (See CONSTRUCTIVE SERVICE OF PROCESS.)
of constructive notice, when authorized, sec. 38, pp. 267–271
affidavit for, what must show, sec. 38, pp. 271–279
officers return as basis for, what mus show, sec. 38, pp. 279, 280
order for what sufficient, sec. 38, pp. 280, 281
what sufficient publication, sec. 38, pp. 281–284
proof of, sec. 38, pp. 284–286

Quo Warranto—
common law prerogative writ in nature of writ of right, sec. 83, p. 659
formerly issued out of chancery, sec. 83, p. 659
object of the writ, sec. 83, pp. 659, 660, 664, 665
superseded by information in nature of *quo warranto*, sec. 83, p. 660
modern proceeding by information defined, sec. 83, p. 660
proceedings by statute for contesting elections, sec. 83, p. 660
proceeding, whatever its form, has become statutory, sec. 83, p. 661
courts may still issue writ as originally existed, sec. 83, p. 661
statute providing other remedy does not take away jurisdiction in, sec. 83, p. 661
held otherwise in some of the states, sec. 83, p. 661
courts of equity, jurisdiction of, sec. 83, p. 662
grant of power to issue writ includes information in nature of, sec. 83, p. 662
includes power to inquire into existence of private corporations or right to exist, when, sec. 83, p. 662

Quo Warranto—*Continued.*
power extends to municipal corporations and officers, sec. 83, p. 662
extent of the power in such cases, sec. 83, pp. 662, 663
when proceeding must be against corporation and when against individuals claiming to be, sec. 83, p. 663
against corporation admits its existence, sec. 83, p. 663
some cases the other way, sec. 83, p. 663
distinction between municipal and private corporations in this respect, sec. 83, p. 664
formerly regarded as criminal preceeding, sec. 83, p. 664
and brought in name of prosecuting officer, sec. 83, p. 664
but under most statutes treated as civil, sec. 83, p. 664
but criminal in its objects and nature, sec. 83, p. 664
object of the proceeding, sec. 83, pp. 664, 665
penalty imposed, what is, sec. 83, p. 665
writ not allowed as of course, but issues on order of court, sec. 83, p. 665
distinction as to this between proceedings on behalf of state and on behalf of private individual, sec. 83, pp. 665, 666
in whose name may be prosecuted, sec. 83, pp. 666, 667
what may be shown to authorize proceeding by private individual, sec. 83, p. 667
power of court sometimes limited by amount in controversy, sec. 83, p. 667
constitutionality of statute, when may be tested by, sec. 83, p. 667
jurisdiction to inquire into right to hold office extends to all classes of officers, sec. 83, p. 668
how far may inquire into right to membership in legislative body, sec. 83, p. 668
how far effected by vesting such power in the body itself, sec. 83, p. 668
jurisdiction does not depend upon, whether office claimed by appointment or popular vote, sec. 83, pp. 668, 669
remedy extraordinary, sec. 83, p. 669
can not be resorted to if adequate remedy by ordinary proceeding, sec. 83, p. 669
only applicable where public has an interest, sec. 83, p. 669
can not be used to test right to purely private office or employment, sec. 83, p. 669
what may be determined under in case of contest for office, sec. 83, pp. 669, 670
foreign corporation may be prevented from doing business in state, when, sec. 83, p. 670

R

Railroads—
legislature may make failure to fence road of conclusive evidence of negligence, sec. 33, p. 229

Real Estate. (See Sales of Real Estate.)
in actions affecting title to, constructive service allowed, sec. 38, p. 270

Receiver. (See Corporations; Jurisdiction; Territorial Jurisdiction.)
territorial extent of authority of, sec. 15, p. 57
can sue where, sec. 15, p. 57
authority of court to appoint, sec. 15, p. 58
property once in possession of, may follow into another state, sec. 15, p. 58

Receiver—*Continued.*
of national bank may sue in United States court without regard to amount in controversy, sec. 16, p. 63
same true of agent of national bank to take place of, sec. 16, p. 63
appointment of, can not give extra territorial jurisdiction over property, sec. 15, p. 57
authority co-extensive only with jurisdiction of court appointing, sec. 15, p. 57
state comity does not require other state to permit receiver to pursue legal remedies therein to detriment of its citizens, sec. 15, p. 57
of one state, no authority to give in another, sec. 15, p. 57
but allowed to do so as matter of comity, when, sec. 15, p. 58
cases holding, may be appointed over property in another state, sec. 15, p. 58
state legislation may bring all property of insolvent corporation within jurisdiction of state where does business, sec. 15, p. 58
and vest receivers with authority over property of, in another state, sec. 15, p. 58
property coming into possession of, within jurisdiction may follow into another state, sec. 15, p. 58
on ground that, has special property in, sec. 15, p. 58

Recitals—
in records, effect of, as evidence of jurisdiction, sec. 23, pp. 127–145; sec. 25, pp. 163–168; sec. 26, pp. 168, 169; sec. 38, p. 286
in record of probate court, effect of, sec. 67, p. 434
in case of sales of real estate, sec. 76, pp. 559, 567

Record. (See Courts of Record; Inferior Courts; Judgments.)
must show jurisdiction of inferior courts, sec. 20, p. 88
technical precision in, of inferior courts not required, sec. 20, pp. 88, 89
recitals in as to jurisdiction of inferior courts, effect of, sec. 20, p. 96
appeals usually tried by, sec. 21, p. 99
jurisdiction of appellate court must appear from, on appeal, sec. 21, p. 99
where want of jurisdiction appears from, appeal dismissed, sec. 21, p. 100
when question of jurisdiction on appeal depends on record made by trial court, conclusive, sec. 21, p. 100
on appeal, court has jurisdiction only of questions presented by, sec. 21, p. 100
want of jurisdiction of subject-matter appearing from, consent can not give, sec. 21, p. 100
real controversy must appear from to give appellate court jurisdiction, sec. 21, p. 101
jurisdiction of inferior courts must be proved by, sec. 23, pp. 125, 126
recital in, controlled by return of officer, sec. 23, p. 126
faith and credit given only to courts shown to have jurisdiction, sec. 23, p. 127
want of jurisdiction may be proved by, sec. 23, p. 127
effect of recital in, of court of another state, sec. 23, p. 128
tendency is to permit proof of want of jurisdiction against recitals in, sec. 23, p. 129
effect of recitals in, as evidence of jurisdiction, sec. 23, pp. 126–144; sec. 25, pp. 163–165; sec. 26, pp. 168–170
difference between, of domestic and foreign courts in this respect, sec. 23, pp. 141, 144, 145; sec. 26, pp. 168, 169

Record—*Continued.*
showing want of jurisdiction is conclusive, sec. 23, pp. 143, 144
power of court over, after change of venue, sec. 24, pp. 151, 152
inherent power of court to amend, sec. 27, p. 181
recitals in, may supply want of publication of notice, sec. 38, p. 286
whether must affirmatively show regular appointment of special judge, sec. 61, pp. 389, 390
recitals in, of probate court, effect of, sec, 67, p. 434
in case of sales of real estate, sec. 76, pp. 560, 567
question of jurisdiction must be determined by, on *habeas corpus*, sec. 82, p. 649
what included in, on writ of error, sec. 84, p. 694
how brought up by *certiorari*, sec. 86, p. 699
what necessary on appeal, sec. 88, p. 735

Recordari—
objects of writ of, sec. 84, p. 690
is now practically unknown, sec. 84, p. 690

Removal of Causes—
from state to federal courts when jurisdiction concurrent, sec. 17, p. 73
deprives state court of jurisdiction, sec. 24, p. 153

Rescission—
of contracts within jurisdiction of courts of equity, sec. 9, p. 24

Residence—
effect of fraudulently making a party to give jurisdiction, sec. 22, p. 104

Return—
of officer on process, effect of in sustaining jurisdiction, sec. 22, p. 116; sec. 39, p. 287
controls recitals in records, sec. 23, p. 126
where shows only part of acts necessary to give jurisdiction, presumptions in case of, sec. 25, pp. 163, 164
of officer as basis for publication of constructive notice, sec. 38, p. 279
what must show, sec. 38, pp. 279, 280
of officer proper proof of service of process by him, sec. 38, p. 287
may be amended, sec. 39, p. 292
when only upon notice, sec. 39, pp. 292, 293
found defective on appeal, effect of, sec. 39, p. 293
of deputy must be made in name of principal, sec. 39, p. 293
in attachment proceedings what must show, sec. 74, p. 537

Rules of Court. (See Inherent Powers of Court.)
extent of powers of courts to make and enforce, sec. 27, p. 177
can not require more in affidavit for change of venue than statute requires, sec. 47, p. 340

S

Sales of Real Estate—
confusion in decided cases and causes therefor, sec. 76, p. 554
whether courts exercising jurisdiction over are superior or inferior, sec. 76, pp. 554, 555
presumptions how far proceedings for upheld by, sec. 76, pp. 554, 555
how facts necessary to uphold may be shown, sec. 76, p. 555
upon what the jurisdiction depends, sec. 76, pp. 555, 556
whether legality of appointment of administrator or guardian can be attacked collaterally in, sec. 76, p. 556
rule that it can not sustained by weight of authority, sec. 76, p. 556

Sales of Real Estate—*Continued.*
record showing want of jurisdiction to appoint, effect of, sec. 76, p. 556
record silent, jurisdiction to appoint presumed, sec. 76, p. 557
where question goes to general power of court, and not to jurisdiction over particular estate, different rule prevails, sec. 76, p. 557
doctrine of federal courts as to right of another court to inquire into jurisdiction, sec. 76, p. 557
what necessary to give court jurisdiction to order sale, sec. 76, p. 557
not sufficient to show jurisdiction over estate, sec. 76, p. 557
application to sell separate proceeding and jurisdiction of must exist, sec. 76, p. 557
power generally depends upon statute, sec. 76, p. 557
but sometimes held to exist in court of equity without statute, sec. 76, pp. 557, 558
as a rule courts of equity have no power to order sale of legal title, sec. 76, p. 558
but may set aside sale, when, sec. 76, p. 558
guardian can not sell without order of court, sec. 76, p. 558
petition for sale, foundation of jurisdiction, sec. 76, p. 558
facts upon which sale authorized jurisdictional, sec. 76, p. 558
and must be alleged in petition, sec. 76, p. 558
substantial compliance with statute sufficient, sec. 76, p. 558
what are the usual grounds for sale, sec. 76, p. 558
defects or errors do not affect jurisdiction, sec. 76, p. 559
one good cause sufficient although other causes not authorizing stated, sec. 76, p. 559
not existence of facts but allegation of them gives jurisdiction, sec. 76, p. 559
whether allegations true or false does not affect, sec. 76, p. 559
but not where record shows required proof was not made, sec. 76, pp. 559, 560
if it appears court determined jurisdictional facts, findings conclusive, sec. 76, p. 560
any evidence, sufficiency of not jurisdictional, sec. 76, p. 560
order of sale is adjudication of all facts necessary to give jurisdiction, sec. 76, p. 560
but if real estate goes to executor only, if debts exist, if no debts, proceeding void, sec. 76, p. 560
some of cases hold finding of debts only *prima facie* evidence of, sec. 76, p. 560
to make finding conclusive, proceeding must be within general jurisdiction, sec. 76, p. 561
courts liberal in upholding, sec. 76, p. 561
record silent, filing of sufficient petition presumed, sec. 76, p. 561
petition must show proceeding brought in proper county, sec. 76, p. 561
where must be commenced, sec. 76, pp. 561, 562
must conform to laws of state where land situated, sec. 76, p. 562
but not necessary ward, or guardian, or executor, reside there, sec. 76, p. 562
ancillary proceedings by non-residents, sec. 76, p. 562
minor non-resident, court may appoint guardian over property, sec. 76, p. 562
order for sale of real estate in another state void, sec. 76, pp. 563, 568
court when may compel non-resident to convey, sec. 76, p. 562
decree, when can not operate beyond jurisdiction, sec. 76, p. 562
some cases hold strict compliance with statute necessary, sec. 76, pp. 562, 563

Sales of Real Estate—*Continued.*
but substantial compliance sufficient, sec. 76, p. 562
notice necessary, sec. 76, p. 563
petition gives jurisdiction of the subject-matter notice of the person, sec. 76, p. 563
held sale by guardian, no notice to ward necessary unless required by statute, sec. 76, p. 563
but authorities the other way, sec. 76, pp. 563, 564
other statutory conditions must be complied with, sec. 76, p. 564
that have been complied with need not appear from record, sec. 76, p. 564
whether ward necessary party to proceeding by guardian, sec. 76, p. 564
authorities conflicting, sec. 76, p. 564
if necessary party, must have notice, sec. 76, p. 564
whether heir necessary party to proceeding by executor or administrator, sec. 76, pp. 564, 565
depends upon requirement of statute, sec. 76, p. 565
distinction between sales by guardians and executors in this respect, sec. 76, p. 565
personal service of notice not necessary, sec. 76, p. 565
general notice to all persons usually sufficient, sec. 76, pp. 565, 566
death of owner, when does not deprive court of jurisdiction, sec. 76, p. 566
rule as to sufficiency of notice, sec. 76, p. 566
failure of guardian *ad litem* to answer, effect of, sec. 76, p. 566
failure to appoint guardian *ad litem*, effect of, sec. 76, p. 566
failure to notify guardian *ad litem* where ward served, effect of, sec. 76, pp. 566, 567
appointment of guardian *ad litem* gives no jurisdiction where minor not notified, sec. 76, p. 567
minor notified, guardian appointed, proceeding binding, sec. 76, p. 567
subsequent reversal of order, effect on purchaser, sec. 76, p. 567
notice presumed, sec. 76, p. 567
but limited in some cases to persons made parties to the record, sec. 76, p. 567
recitals in record as to notice, effect of, sec. 76, pp. 567, 568
jurisdiction appearing from record, purchaser need not look beyond, sec. 76, p. 568
usually held record imports verity, sec. 76, p. 568
cases the other way, sec. 76, p. 568
confirmation of sale, effect of, sec. 76, pp. 568, 569
proceedings by creditor for sale of real estate, principles affecting, sec. 76, p. 569
additional bond for sale, effect of failure to give, sec. 76, p. 569
defect in original bond does not affect jurisdiction, sec. 76, p. 570
proceeding may be removed to federal court, sec. 76, p. 570
whether legislature may order sale without intervention of court, sec. 76, pp. 570, 571
can not where no fiduciary relation on part of one authorized to sell, sec. 76, p. 571
sales in partition proceedings, sec. 76, p. 572
Service of Process. (See COMMON LAW, JURISDICTION.)
actual and constructive, what are, sec. 13, p. 41
acknowledgment of, in lieu of actual, sec. 13, p. 41
on foreign corporations, how made, sec. 13, p. 43
by leaving copy at usual place of residence, sec. 13, p. 43

Service of Process—*Continued.*
on defendant temporarily within state, sec. 13, p. 43
how made on minor, sec. 13, p. 43
constructive, statute must be strictly complied with, sec. 13, p. 43
constructive, how made in England, sec. 13, p. 44
constructive, not known at common law, sec. 14, p. 51
constructive, provided for in English judicature acts, sec. 14, p. 51
modes of, generally statutory and to be strictly pursued, sec. 14, p. 51
process of limited territory within state, may extend throughout state, sec. 15, p. 53
process of one state can not run into another without consent, sec. 15, p. 53
return of officer held not conclusive, sec. 22, p. 116
sometimes held conclusive, sec. 22, p. 117
remedy against officer making false return, sec. 22, p. 117
question whether has been made, return not conclusive, sec. 22, p. 117
return conclusive where collateral attack against domestic judgment sec. 22, p. 117
conclusiveness confined to facts certified of officer's own knowledge, sec. 22, p. 117
of summons set aside if deceit practiced, sec. 22, p. 117
defendant waives objection by appearing and pleading, sec. 22, p. 117
presumptions as to, sec. 25, pp. 159–168
statutes of different states substantially the same as to material matters, sec. 37, p. 251
but differ as to matters of form, sec. 37, p. 251
purpose and object of such statutes, sec. 37, p. 251
due service necessary to give jurisdiction, sec. 37, p. 252
by whom may be made, sec. 37, p. 252
generally by officers designated by statute, sec. 37, p. 252
but may be by private individuals when authorized by law, sec. 37, p. 252
when by special deputies, sec. 37, p. 252
distinction between general and special deputies as to power to serve, sec. 37, p. 253
power of special limited to county covered by appointment, sec. 37, p. 253
so when limited to service of particular writ, sec. 37, p. 253
but service not void where could serve as private individual, sec. 37, p. 253
but proof of such service must be by affidavit and not by return, sec. 37, p. 253
appointment of special bailiff without seal, effect of, sec. 37, p. 254
failure to indorse appointment on writ, effect of, sec. 37, p. 254
power of constable to appoint deputy, and powers of, sec. 37, p. 254
sheriff can not serve out of his county, sec. 37, p. 254
nor can private individual, sec. 37, p. 254
direction of writ to wrong officer, effect of, sec. 37, pp. 254, 255
rule where proper officer is claimed to be disqualified, sec. 37, p. 255
effect of service by private individual, sec. 37, p. 255
general rule that officer can not serve process in his own case, sec. 37, p. 255
but held in some cases rule not applicable to summons, sec. 37, p. 255
and this is the better rule, sec. 37, p. 255
only objection to such service is liability to false return, sec. 37, p. 256

Service of Process—*Continued.*
where statute provides for service by disinterested person, service by interested party void, sec. 37, p. 256
conditional authority of court to appoint private individual to serve, conditions must exist or service void, sec. 37, p. 256
but will be presumed if not required to be affirmatively stated in writ, sec. 37, p. 256
otherwise if required to be stated, sec. 37, p. 256
if reasons for appointment not set out, when required, can not be amended after service, sec. 37, p. 256
must appear that private individuals have statutory qualifications, sec. 37, p. 256
indorsement on original authorizing party to serve does not authorize service of *alias*, sec. 37, p. 257
when may be served, sec. 37, p. 257
generally not before filing of complaint, sec. 37, p. 257
nor after return day, sec. 37, p. 257
alias must issue in such case, sec. 37, p. 257
held may be dated, issued and returned on return day, sec. 37, p. 257
service on return day voidable, not void, sec. 37, p. 257
where may be served, sec. 37, p. 257
not beyond territorial jurisdiction of court issuing, sec. 37, p. 257
unless expressly authorized, sec. 37, pp. 257, 258
but service out of jurisdiction may be authorized by statute, sec. 37, p. 258
service out of county usually provided for, sec. 37, p. 258
and sometimes out of state, sec. 37, p. 258
non-resident temporarily within state may be served, sec. 37, p. 258
exception where in attendance at court as party or witness or going or coming, sec. 37, p. 258
must have reasonable time to return to his state, sec. 37, p. 258
some cases hold exemption only applies attendance under writ involving arrest, sec. 37, p. 259
but weight of authority the other way, sec. 37, p. 259
extends to persons attending before officer to give deposition, sec. 37, p. 259
but not where deposition to be used in another state, sec. 37, p. 259
immunity does not depend upon statute, sec. 37, p. 259
nor upon citizenship, sec. 37, p. 259
applies to resident of state attending out of his county, sec. 37, pp. 259, 260
but sometimes held service on resident out of county not void, but entitles to change of venue, sec. 37, p. 259
distinction between resident and non-resident in case of arrest, sec. 37, p. 259
exception extends to one induced to come within jurisdiction by fraud, sec. 37, pp. 260, 261
rule applies to officer of corporation, sec. 37, p. 261
member of congress privileged while in attendance at session and going and returning, sec. 37, p. 261
deviation from direct route, effect of, sec. 37, p. 261
rule applies to members of legislature, sec. 37, p. 261
in some cases confined to process involving arrest, sec. 37, p. 261
but better rule extends it to civil process not involving arrest, sec. 37, p. 261
question of privilege, how raised, sec. 37, p. 261

Service of Process—*Continued.*
what necessary to authorize service on joint defendant residing out of county, sec. 37, p. 261
resident defendant must have real interest adverse to plaintiff, sec. 37, pp. 261, 262
defective service, how question of raised, sec. 37, p. 262
distinction between void and defective as to time and manner of raising objection, sec. 37, p. 262
how may be served, sec. 37
personal service generally required, sec. 37, p. 262
what will constitute personal service, sec. 37, p. 262
leaving copy at place of residence, what necessary, sec. 37, pp. 262, 263
strict compliance with statute required, sec. 37, p. 262
summons for wife, leaving copy with husband, effect of, sec. 37, p. 262
generally copy of complaint must be served with, sec. 37, p. 263
when required service of such copy necessary to give jurisdiction, sec. 37, p. 263
where certified copy required, copy not certified insufficient, sec. 37, p. 263
service on partners, what sufficient, sec. 37, p. 263
variance between copy served and original, effect of, sec. 37, p. 264
service on minors, what necessary, sec. 37, p. 264
on insane persons, sec. 37, p. 265
on married women, sec. 37, p. 265
on persons acting in official capacity, sec. 37, p. 266
constructive service of process, sec. 38
meaning of, sec. 38, p. 266
includes personal service out of state, sec. 38, p. 266
is exceptional mode of service, sec. 38, p. 266
statutes authorizing must be complied with, sec. 38, p. 266
division of the subject, sec. 38, p. 266
a. *in what cases allowed*, sec. 38, p. 267
under control of the state, sec. 38, p. 267
general rule personal action can not be maintained on, sec. 38, p. 267
either against resident or non-resident, sec. 38, p. 267
personal judgment, what is, sec. 38, p. 268
allowed in actions *in rem*, and attachment, sec. 38, p. 269
but relief confined to property, sec. 38, p. 269
seizure of property generally necessary, sec. 38, p. 270
and notice, sec. 38, p. 270
allowed in cases to enforce specific liens on property within jurisdiction, sec. 38, p. 270
as in case of mortgage on real or personal property, sec. 38, p. 270
proceedings affecting title to real estate, sec. 38, p. 270
to set aside fraudulent conveyances, sec. 38, p. 270
actions to quiet title, sec. 38, p. 270
to abate nuisances, sec. 38, p. 270
to establish trusts in real estate, sec. 38, p. 270
in such cases jurisdiction depends upon presence of property, sec. 38, p. 270
and personal judgment can not be rendered, sec. 38, p. 270
allowed in cases affecting *status* of parties, as in divorce, sec. 38, p 270

Service of Process—*Continued.*
but can be no personal judgment on, as for alimony, sec. 38, p. 270
independent of statute, courts can not authorize, sec. 38, p. 271
courts of equity, when may authorize service on other person for non-resident, sec. 38, p. 271
b. *the affidavit*, sec. 38, p. 271
making of, is jurisdictional, sec. 38, p. 271
what must be shown by, sec. 38, pp. 271, 272
may be sufficient to give jurisdiction, but defective, and subject to direct attack, sec. 38, p. 272
what must contain governed by statute, sec. 38, pp. 272, 273
but every step required may be taken and yet service be void, when, sec. 38, pp. 272, 373
how fact of non-residence may be established, sec. 38, p. 273
facts required to be stated in, can not be supplied by other evidence, sec. 38, p. 273
held not to be part of judgment roll, sec. 38, pp. 273, 274
and that was made will be presumed, sec. 38, p. 274
must appear from that case is one for constructive notice, when, sec. 38, p. 274
when complaint may be looked to for cause of action, sec. 38, pp. 274, 275
general statement of cause of action sufficient, sec. 38, p. 275
not always sufficient to follow language of statute, sec. 38, p. 275
diligence to find defendant for personal service, what showing of necessary, sec. 38, pp. 275, 276, 277
facts as to what was done must be stated, sec. 38, p. 275
but any facts tending to show, gives court jurisdiction to determine question, sec. 38, p. 275
what constitutes due diligence can not be definitely stated, sec. 38, pp. 275, 276
allegation of property within jurisdiction, how must be made, sec. 38, p. 276
what may be stated on information and belief, sec. 38, p. 276
that defendant is out of state must be positive and direct, sec. 38, p. 276
absence from state, what sufficient, sec. 38, pp. 276, 277
strictness required in stating nature of action, sec. 38, p. 277
name of party to be published against necessary, sec. 38, p. 277
except where defendant may be sued under fictitious name, sec. 38, p. 277
then must be shown that true name is unknown, sec. 38, p. 277
false statement of cause of action in, effect of, sec. 38, p. 277
does not affect jurisdiction court, sec. 38, p. 278
of non-residence must relate to time of order for publication, sec. 38, p. 278
how near the time must be made, sec. 38, p. 278
need not be made at time complaint is filed, sec. 38, p. 278
in some states complaint must be filed *after* proof of publication, sec. 38, p. 278
and if filed before, judgment void, sec. 38, p. 278
when affidavit may be amended, sec. 38, p. 279
difficulty of making personal service no ground for publication, sec. 38, p. 279
insufficiency of complaint not ground for attacking notice, sec. 38, p. 279
c. *officers return as basis for publication*, sec. 38, p. 279
facts necessary for, when may be shown by, sec. 38, p. 279

Service of Process—*Continued*,
what must be shown by, sec. 38, p. 279
d. *order of publication*, sec. 38, p 280
must require all acts to be done that statute requires, sec. 38, p. 280
is the authority for making the service, sec. 38, p. 280
and proper service without necessary order therefor is void, sec. 38, p. 280
what order must contain, sec. 38, pp. 280, 281
e. *the publication*, sec. 38, p. 281
what must be, governed by statute, sec. 38, p. 281
in some states summons published, sec. 38 p. 281
in others notice containing its substance, sec. 38, p. 281
irregularities do not render void, sec. 38, p. 281
but distinction in this respect between personal and constructive service, sec. 38, pp. 281, 282
publication for less than required time, effect of, sec. 38, pp. 282, 283
rule in cases of petition by guardian for sale of ward's property, sec. 38, p. 283
petition said to give jurisdiction in such cases, sec. 38, p. 283
relief demanded of which notice is given limits jurisdiction to granting such relief, when, sec. 38, p. 284
death of defendant pending publication, new notice necessary, sec. 38, p. 284
where publication measured by months, calendar months meant, sec. 38, p. 284
what is sufficient length of time for publication, sec. 38, p. 284
f. *proof of publication*, sec. 38, p. 284
validity of judgment does not depend upon, sec. 38, p. 284
but upon fact of publication, sec. 38, p. 284
therefore may be supplied after judgment, sec. 38, p. 285
and may be amended, sec. 38, p. 285
failure to make is irregularity merely, sec. 38, p. 285
but judgment void on face right to supply or amend subject to intervening rights, sec. 38, p. 285
facts of publication may be established, how, sec. 38, p. 285
by whom affidavit may be made, sec. 38, p. 285
warning order takes place of summons, and proof the place of officers' return, sec. 38, p. 286
facts appearing in, by way of recital, effect of, sec. 38, p. 286
after many years slight proof sufficient, sec. 38, p. 286
g. *personal service out of state*, sec. 38, p. 286
is constructive service, sec. 38, p. 286
and allowed on like showing as for publication, sec. 38, p. 286
and usually length of service the same, sec. 38, p. 286
proof of personal service of process, sec. 39
service, not proof of, gives jurisdiction, sec. 39, p. 287
service by officer, proof of by his return, sec. 39, p. 287
by private individual, by his affidavit, sec. 39, p. 287
but such modes not exclusive, but proof may be made otherwise, sec. 39, p. 287
but sometimes held can not be by parol, sec. 39, p. 287
and this so where question arises on appeal, sec. 39, pp. 287, 288
facts necessary to show valid service must be shown, sec. 39, p. 288
competency of private individual to serve must be shown, when, sec. 39, p. 288
but failure to show mere irregularity, sec. 39, p. 288
in other respects return and affidavit the same, sec. 39, p. 288

Service of Process—*Continued.*
what sufficient to be shown, sec. 39, pp. 288, 289
service of copy of complaint must appear, when, sec. 39, p. 289
and certified copy, sec. 39, p. 289
how writ must be delivered, sec. 39, p. 289
service by mail, what sufficient proof of, sec. 39, p. 289
strictness required where service by leaving copy, sec. 39, p. 290
must show place of service, sec. 39, p. 290
but when will be presumed to have been within jurisdiction, sec. 39, p. 290
failure to give name of party served, service a nullity, sec. 39, p. 290
variance in name in summons and return, effect of, sec. 39, p. 290
action against husband and wife, effect of proof of service on husband, sec. 39, p. 290
proof necessary where service allowed on one person if another not found, sec. 39, p. 291
service not shown by acceptance of, sec. 39, p. 291
by third party, authority must appear, sec. 39, p. 291
can not be made by a minor, or by guardian for him, sec. 39, p. 291
genuineness of signature to acceptance must be shown, when, sec. 39, p. 291
service out of state, what necessary, sec. 39, p. 292
what necessary as to time of service, sec. 39, p. 292
return may be amended even after judgment, sec. 39, p. 292
but subject to intervening rights, when, sec. 39, p. 292
must be upon notice, when, sec. 39, p. 292
found defective on appeal, effect of, sec. 39, p. 293
when verification of return necessary, sec. 39, p. 293
by deputy, must be in name of principal, sec. 39, p. 293
by special deputy, how proof made, sec. 39, p. 293
need not appear that service was by deputy, when, sec. 39, p. 293
effect of return in name of special deputy, sec. 39, p. 294
time when return should be made, sec. 39, p. 294
effect of return, whether conclusive or not, sec. 39, p. 294
proof by private individual may be contradicted, sec. 39, p. 295
defects in return not ground for quashing writ, sec. 39, p. 295
due service, when presumed, sec. 39, p. 295
but proof showing insufficient service not aided by presumption, when, sec. 39, p. 295
degree of exactness required in proof, sec. 39, p. 295
distinction between personal and constructive service, sec. 39, pp. 295, 296
question on appeal not necessarily one of jurisdiction, sec. 39, p. 296
jurisdiction should not be allowed to fail for want of formal proof, sec. 39, pp. 296, 297
defective process and service, sec. 40
distinction between defective and void service, sec. 40, pp. 297, 299
former confers jurisdiction, latter not, sec. 40, p. 297
latter ground for collateral attack, former not, sec. 40, p. 297
proof may be amended, sec. 40, p. 298
when can not be amended after appeal, sec. 40, p. 298
distinction between actual and constructive service as to effect of, sec. 40, pp. 298, 299
waiver of process and service and defects therein, sec. 41
effect of general appearance, sec. 41, p. 300
is equivalent to service, sec. 41, p. 300

Service of Process—*Continued.*
persons under disabilities can not waive, sec. 41, p. 300
nor can their guardians, sec. 41, p. 300
exceptions in case of guardians, sec. 41, p. 300
service on minor necessary to authorize appointment of guardian *ad litem*, sec. 41, p. 301
and person appointed can do no act conferring jurisdiction, sec. 41, p. 301
effect of such appointment and appearance, sec. 41, pp. 301, 302
distinction between, and failure to appoint where there is service, sec. 41, p. 302
recitals in record binding on minors, sec. 41, p. 302
when service on minor not necessary to give jurisdiction, sec. 41, p. 302
in case of petitions in proceedings not adversary, sec. 41, p. 302
attorney can not waive service on minor, sec. 41, p. 303
receipt of benefits of judgment, effect of, as waiver, sec. 41, p. 303
agreement to waive return of service, effect of, sec. 41, p. 303
summons by wrong name, effect of appearance, sec. 41, p. 303
setting up objections, effect of, as waiver of other objections, sec. 41, p. 303
failure to appear and object, effect of, sec. 41, p. 303
time within which objection to defects may be taken, sec. 41, p. 304
relief on account of fraud, sec. 41, p. 304
acceptance of service, effect of, as a waiver, sec. 41, p. 304
authority of agent to waive, sec. 41, p. 304
waiver without appearance, how may be done, sec. 41, pp. 304, 305
bringing action in wrong county, how waived, sec. 41, p. 305
appearance and contest of service does not waive right to writ of error, sec. 41, p. 305
of new parties and amended pleadings, sec. 42
when new parties made how jurisdiction obtained, sec. 42, p. 305
no new service necessary when new parties plaintiff made, sec. 42, p. 305
auxiliary proceedings in equity service may be made on attorneys, when, sec. 42, p. 305
an amendment of complaint where no appearance, when new service necessary, sec. 42, p. 306
new parties when new service on original parties necessary, sec. 42, p. 306
presumptions in such cases, sec. 42, p. 306
substituted plaintiff, no new process necessary, sec. 42, pp. 306, 307
or where name of plaintiff stricken out, sec. 42, p. 307
in case of death of defendant and substitution of representative or heir, what notice necessary, sec. 42, pp. 307, 308
when cause pending on writ of error, sec. 42, p. 307
decision after death relates back, sec. 42, p. 307
on reversal what necessary in court below in case of death, sec. 42, p. 307
in actions against corporations, sec. 43
manner of making service on, difference between and on natural persons, sec. 43, p. 308
statutes compelling submission of to service out of state as condition of doing business, sec. 43, p. 308
constitutionality of such statutes upheld, sec. 43, p. 308
conditions must be reasonable, sec. 43, pp. 308, 309

Service of Process—*Continued.*
right to serve in state other than that of its creation wholly statutory, sec. 43, p. 309
right to sue in foreign state not confined to actions growing out of business done therein, sec. 43, p. 309
distinction as to corporations acting under interstate commerce law, sec. 43, p. 310
corporation not a citizen within meaning of constitution, sec. 43, p. 310
and state may impose conditions upon which it may do business therein, sec. 43, p. 311
right to trial within county or state of residence a personal privilege and may be waived, sec. 43, p. 311
corporation doing business in state where conditions imposed waives right to be sued elsewhere, sec. 43, p. 311
but can not, independently of such statute, be sued out of its state, sec. 43, pp. 311, 312
upon whom service on may be made, sec. 43, pp. 313–316
as to manner of service statute must be strictly pursued, sec. 43, p. 316
"station agent," meaning of, sec. 43, p. 316
return of officer as to kind of officer served, effect of, sec. 43, p. 316
service on two officers required, service on one insufficient, sec. 43, pp. 316, 317
"general agent" and "managing agent," meaning of, sec. 43, pp. 317, 318
may be sued in any county, sec. 43, p. 318
agent or officer can not be served outside of territory he represents, sec. 43, pp. 318, 319
or outside of county in which public corporation is situated, sec. 43, p. 319
service on officer in foreign state, must be at the time acting for the corporation in such state, sec. 43, p. 319
service may be on mere clerk if statute authorizes, sec. 43, p. 319
what will amount to such doing business as to authorize service in foreign state, sec. 43, pp. 319, 320
presence of officers alone will not authorize, when, sec. 43, p. 320
service by publication may be had, when, sec. 43, p. 321
when may be sued in state of residence of either plaintiff or defendant, sec. 43, p. 322
sometimes right to serve depends upon presence of property within jurisdiction, sec. 43, p. 322
in federal court, law of state in which court held controls, when, sec. 43, pp. 322, 323
different rule as to service where corporation created by act of congress, sec. 43, p. 323
may be sued in any state where is doing business, sec. 43, p. 323
doing business in another state does not change place of citizenship, sec. 43, pp. 323, 324
where cross-complaint is filed, sec. 44
new parties brought in by, must be served, sec. 44, p. 324
but if against parties before the court, not necessary, sec., 44, p. 324
when party must take notice of all pleadings filed, sec. 44, p. 324
where service is not necessary in case of default under original complaint, sec. 44, p. 324
when service of pleading, without summons, sufficient, sec. 44, p. 324

Service of Process—*Continued.*
stranger coming in and setting up cause of action, summons must issue, sec. 44, p. 325
in equity, service may be made on attorney, sec. 44, p. 325
Set-off. (See COUNTERCLAIM.)
Sheriff—
power of to appoint deputies, sec. 37, pp. 252, 254
can not serve process out of his county, sec. 37, p. 254
disqualified, who must serve process, sec. 37, p. 255
Special Cases and Proceedings—
what are, sec. 68, p. 461
courts have not been able to define, sec. 68, p. 462
or find dividing line between, and ordinary actions, sec. 68, pp. 462, 463
no reason for distinction between, and actions, sec. 68, pp. 461, 462, 463
question important because court exercising jurisdiction over special cases held to be inferior, sec. 68, p. 463
probate proceedings classed as special in some codes, sec. 68, p. 463
but probate courts usually held not to be inferior, sec. 68, p. 463
strictness necessary in complying with statutory requirements, sec. 68, p. 464
no reason for distinction between, and common-law proceedings in this respect, sec. 68, p. 464
and rule of strict compliance usually confined to summary proceedings, sec. 68, p. 464
finding of facts to give jurisdiction conclusive, sec. 68, p. 464
petition filed what must show to give jurisdiction, sec. 68, p. 465
rule with reference to special proceedings generally same as in case of inferior courts, sec. 68, p. 465
what are made special by the codes, sec. 68, p. 465
courts held many of them not to be special, sec. 68, p. 465
cases held not to be enumerated, sec. 68, p. 466
classed as in code does not make case special, sec. 68, p. 467
proceedings held to be special enumerated, sec. 68, pp. 467, 468
proceedings by executors, etc., to sell real estate, how classed, sec. 68, p. 468
presumptions in favor of, sec. 68, p. 468
power given legislature to confer jurisdiction in special cases, effect of, sec. 68, pp. 468, 469
what "special cases" held to include, sec. 68, p. 469
and "special proceedings," sec. 68, p. 469
statute giving jurisdiction of "all special cases not otherwise provided for," effect of, sec. 68, p. 469
Special Judges. (See JUDGES; JURISDICTION,)
how appointed and powers and duties of, sec. 61, pp. 386–395
when attorney may be appointed as, sec. 61, p. 387
statutes authorizing appointment of, held unconstitutional, sec. 61, p. 387
that was legally appointed, when presumed, sec. 61, p. 389
whether record must show legal appointment, sec. 61, pp. 389, 390
acts of, may be upheld as *de facto* officer, sec. 61, p. 391
when acts of, not void for want of regular appointment, sec. 61, p. 391
failure to take oath, effect of, sec. 61, p. 392

Special Jurisdiction. (See Courts; Inferior Courts; Jurisdiction; Probate Jurisdiction; Sales of Real Estate.)
can only be exercised as provided by statute, sec. 10, p. 29; sec. 20, pp. 87, 88
same rule whether court one of special or general jurisdiction, sec. 20 p. 88; sec. 25, p. 156
proceedings of court must show on their face that statute has been followed, sec. 20, p. 88
technical precision not required, sec. 20, p. 88
liberality in upholding jurisdiction of courts of, sec. 20, p. 89
jurisdictional steps to be taken, what are, sec. 20, p. 89
affecting subject-matter can not be supplied by waiver or consent, sec. 20, pp. 89, 90
personal notice may be waived, sec. 20, pp. 89, 90
notice affecting public can not be waived, sec. 20, p. 89
test to determine whether step required affects person or subject-matter, sec. 20, p. 90
limited, what necessary to show jurisdiction, sec. 20, p. 91
properly acquired, must be exercised in conformity to statute, sec. 20, p. 93
discretion of court of, can not be controlled by another court, sec. 20, p. 93
power to set aside final judgment not incident to court of, sec. 20, p. 93
if authorized, mode provided must be followed, sec. 20, p. 93
power of court of, where right to proceed is given to designated persons, sec. 20, p. 94
what record must show in such case, sec. 20, p. 94
summary, statute must be strictly pursued, sec. 20, p. 94
not summary, substantial compliance sufficient, sec. 20, p. 94
conferred on court of general jurisdiction, court is inferior as to, sec. 20, p. 94; sec. 25, p. 156
special mode of acquiring jurisdiction of non-resident, strict compliance with statute necessary, sec. 20, p. 95
recital in record showing compliance with statute, effect of, sec. 20, pp. 96, 97
when jurisdiction is special, sec. 25, pp. 156–162
no presumption in favor of proceedings of courts of, sec. 25, p. 155
statutory not necessarily special, sec. 25, pp. 158–161
jurisdiction of federal courts not special, sec. 25, p. 162
once attached, presumption that was properly exercised, sec. 25, p. 166
of probate courts, whether are or not, sec. 67, p. 633
in special cases and proceedings, sec. 68, pp. 461–469
whether is, in proceedings for sale of real estate, sec. 76, p. 560
in mandamus, is not, sec. 80, p. 627

Specific Performance—
courts of equity have jurisdiction of, sec. 9, p. 24
whether action for, of contract to convey real estate is local or transitory, sec. 12, p. 33; sec. 15, p. 53
held court of one state may compel, of contract to convey property in another, sec. 12, p. 34; sec. 15, p. 53
but this is doubtful, sec. 15, p. 53

State—
may provide notice necessary to be given to their own citizens, sec. 33, p. 213

State—*Continued.*
personal service within, when necessary to give jurisdiction, sec. 33, pp. 213, 214
can not authorize taking of property of own citizen without notice, sec. 33, pp. 214, 215
how far may exercise police powers without taking property without due process of law, sec. 33, p. 221
may change remedy and courts to which party may resort, sec. 33, p. 224
power of, to substitute constructive for personal service, sec. 38, p. 267
judge can not act out of, sec. 57, p. 372

Statute—
creating court, effect of repeal of on jurisdiction, sec. 24, p. 147
requiring inferior courts to act within limited time, effect of failure to comply with, sec. 24, pp. 148, 149
jurisdiction given by, not necessarily special, sec. 25, pp. 158–163
making action of officer conclusive without notice and hearing in assessment for public improvement void, sec. 33, pp. 220, 221
remedy may be changed by, sec. 33, p. 224
how far remedy, procedure and rights may be changed by, sec. 33, p. 224
when constitutionality of may be inquired into by *habeas corpus*, sec. 82, p. 646
and by *quo warranto*, sec. 83, p. 667

Statutory Jurisdiction—
not necessarily special, sec. 25, pp. 158–161
intermingled with common law and equity, sec. 66, p. 420
remedies provided by statute that did not formerly exist, sec. 66, p. 421
considered as exceptional, sec. 65, p. 425
common law and equity granted by statute, sec. 65, p. 421
and is really statutory, sec. 65, p. 422
probate jurisdiction has become, sec. 67, p. 431
in divorce cases is, sec. 73, pp. 505, 506
in arrest and bail, sec. 78, p. 585
in injunctions has become, sec. 79, p. 588
in prohibition is, sec. 80, p. 627
in *quo warranto* is, sec. 83, p. 661
appeals are, sec. 88, p. 727

Subject-matter. (See JURISDICTION.)
of an action, what is, sec. 12, p. 32
jurisdiction of, can not be conferred by consent of parties, sec. 10, p. 29; sec. 11, p. 30; sec. 20, p. 89
courts of general powers presumed to have jurisdiction over, sec. 11, p. 31
jurisdiction of, may be given by agreed statement, sec. 12, p. 33
affidavit that controversy real necessary, sec. 12, p. 33
when appellate court has, on appeal from lower court not having jurisdiction of, sec. 12, p. 34
test to distinguish between jurisdiction of, and of person, sec. 20, p. 90
limited jurisdiction over, how must be shown, sec. 20, p. 91
want of jurisdiction of, can not be waived, sec 22, p. 118
presumptions as to jurisdiction of, sec. 25
judgment without jurisdiction of, void, sec. 26, p. 168

Subject-matter—*Continued.*
objection to jurisdiction over, not waived by appearance, sec. 34, pp. 228, 232
bringing action in wrong place, effect of, on jurisdiction over, sec. 46, pp. 427–434

Subpœna—
first process in equity, upon commencement of suit, sec. 35, p. 235
writs following to compel service, sec. 35, p. 235
mode of compelling obedience to, sec. 35, p. 236

Summary Jurisdiction—
includes exercise of inherent powers, sec. 27, p. 171; sec. 30, p. 196
generally regulated by statute, sec. 30, p. 197
statutes must be strictly pursued, sec. 30, p. 198
against attorneys for misconduct, sec. 31, p. 198

Summary Proceedings—
when United States may collect debts by, sec. 33, p. 212

Summons. (See Process and Service of Process.)
objection that not properly served, how raised, sec. 22, pp. 106, 108, 109
may be signed by attorney in some states, sec. 32, p. 205
but are not process of the court, but mere notice, sec. 32, p. 205
original and other common law writs to compel appearance superseded by, sec. 35, p. 236
defined, sec. 35, pp. 236, 237
not satisfactory definition, sec. 35, p. 237
object is to give notice and opportunity to appear, sec. 35, p. 237
means of acquiring jurisdiction of the person, sec. 35, p. 237
is sometimes signed by attorney for plaintiff,sec. 35, p. 237
in some states called a citation, sec. 35, p. 237
generally must issue under seal of court, sec. 35, p. 237
publication of constructive service, sec. 35, p. 239
requisites of, sec. 36, pp. 239–251
may be amended by attaching seal, sec. 36, p. 246
without a seal not void, sec. 36, p. 246
required to run in name of state, sec. 36, p. 247
but failure renders irregular not void, sec. 36, p. 247
issuing is ministerial act, sec. 36, p. 247
clerk may issue in his own behalf, sec. 36, p. 248
directed to wrong officer, effect of, sec. 36, p. 248
issued on Sunday, effect of, sec. 36, p. 249
when must issue, sec. 36, p. 249
alias, when may issue, sec. 36, p. 249
return day, what is, sec. 36, p. 249
made returnable at wrong time, effect of, sec. 36, pp. 249, 250
first term of court usually made return day, sec. 36, p. 250
returnable on legal holiday not void, sec. 36, p. 250
name of attorney, failure to indorse on, effect of, sec. 36, pp. 250, 251
may be aided by complaint, sec. 36, p. 251
service of, sec. 37, p. 251
time and manner of governed by statute, sec. 37, p. 251
by whom service may be made, sec. 37, 252
direction to wrong officer, effect of, sec. 37, p. 254
presumptions in favor of service, sec. 37, p. 255
can officer serve in his own behalf, sec. 37, pp. 255, 256
by interested party when void, sec. 37, p. 256
when court may appoint private person to serve, sec. 37, p. 256

Summons—*Continued.*
qualifications of private persons, when must be shown, sec. 37, p. 256
indorsement authorizing person to serve original does not authorize to serve *alias*, sec. 37, p. 257
when may be served, sec. 37, p. 257
where may be served, sec. 37, pp. 257–262
out of state, effect of, sec. 37, p. 258
witness or party in attendance at court privileged from, sec. 37, pp. 258, 259
extends to attendance before referee to give deposition, sec. 37, p. 259
privilege extends to one induced to come within the state by fraud, sec. 37, p. 260
and to members of congress and of the legislature while in *attendance* at and coming and going from session, sec. 37, p. 261
question of privilege, how raised, sec. 37, p. 261
how must be served, sec. 37, pp. 262–264
service of on minors, how made, sec. 37, p. 264
service of on insane persons, how made, sec. 37, p. 265
service on persons acting in official capacity, sec. 37, p. 266
constructive service of, sec. 38, p. 266. (See CONSTRUCTIVE SERVICE OF PROCESS.)
when necessary on filing cross-complaint, sec. 44, p. 324

Sunday—
courts can not transact business on, sec. 19, p. 82
except in certain cases, sec. 19, p. 82
rule at common law as to legal proceedings on, sec. 19, p. 83
departures from common law rule, sec. 19, p. 83
verdict of jury may be received on, sec. 19, p. 82
court may reinstruct jury on, sec. 19, p. 82
judgment can not be rendered on, sec. 19, p. 83
summons issued on, when upheld, sec. 36, p. 249

Supreme Court of Judicature. (See COURTS).
a consolidation of common law, equity, admiralty, ecclesiastical, and bankruptcy courts, in England, sec. 3, p. 3
consists of two permanent divisions, viz., the high court of justice and the court of appeals, sec. 3, p. 3
high court of justice originally divided into five divisions:
a. chancery division
b. queen's bench division
c. common pleas division
d. exchequer division
e. probate, divorce, and admiralty division, sec. 3, p. 3
divisions may be changed by court, sec. 3, p. 4
business of common pleas and exchequer transferred to queen's bench division, sec. 3, p. 4
practice and forms of proceedings in, found in rules and orders of court, sec. 3, p. 4
judges of, how distributed to divisions, sec. 3, p. 4

Supreme Court of United States. (See FEDERAL COURTS.)

T

Taxes. (See INJUNCTIONS.)
on what grounds court of equity will enjoin enforcement of, sec. 79, pp. 600–607

Terms of Court. (See Courts; Judges; Vacation.)
parties can not stipulate for trial out of term time, sec. 19, p. 81
acts performed by judge, and not by court, may be done out of term, sec. 19, p. 81
acts performed by court must be done in term time, sec. 19, p. 81
judge can not fix, unless expressly authorized by statute, sec. 19, p. 82
special, what necessary to give jurisdiction during, sec. 19, p. 82
court may regulate times of sitting and adjournment during, sec. 19, p. 84
proceedings begun on second day of, where court absent on first, are valid, sec. 19, p. 84
effect on power of court over its records by final adjournment, sec. 19, p. 84
where causes may be heard at special, by consent of parties, consent necessary to give jurisdiction, sec. 19, p. 85
as to whether court can hold over after to complete trial, *quære*, sec. 19, p. 85
can not be shortened by adjournment, sec. 19, p. 85
judgment can not be rendered in vacation, sec. 19, pp. 84, 85
can not be rendered valid by consent of parties, sec. 19, pp. 84, 85
judgment rendered during, may be entered in vacation, sec. 19, p. 86
prothonotary of court may sometimes sign and so enter judgments, sec. 19, p. 86
rule as to entry where judgments are required to be read and signed in open court, sec. 19, p. 86
court must be convened at time provided by law to constitute legal, sec. 19, p. 87
court may usually be adjourned from day to day until appearance of judge, sec. 19, p. 87
if court is not opened, business goes over to next term, or to a special, sec. 19, p. 87
after court opens in term, presence of judge necessary to transaction of legal business, sec. 19, p. 87
where certain number of judges required, presence of any one can not be dispensed with, sec. 19, p. 87
but where one is temporarily made a witness, jurisdiction not affected, sec. 19, p. 87
jurisdiction of court suspended between, sec. 24, p. 154

Territorial Jurisdiction. (See Change of Venue; Venue.)
state can not exercise jurisdiction beyond its limits, sec. 15, p. 51
same rule applicable to smaller divisions of government, sec. 15, p. 52
but may prescribe notice to be given to its own citizens, sec. 15, p. 52
can not authorize extension of process of its courts into other states, sec. 15, p. 53
may, with consent of other state, sec. 15, p. 53
specific performance courts of state where defendant resides has jurisdiction, sec. 15, p. 53
and held may enforce conveyance of property in another state, sec. 15, p. 53
but this doubtful, sec. 15, p. 53
over land in two counties in both or either, sec. 15, p. 54
same where mortgage covers lands partly in each of two states, sec. 15, p. 55
corporation a citizen of state of its creation, sec. 15, p. 56
held also to be a citizen of state where does business, sec. 15, p. 56
created by laws of several states citizen of either, sec. 15, p. 57

Territorial Jurisdiction—*Continued.*
corporation owns property in different states, court can not obtain jurisdiction over all by appointment of receiver, sec. 15, p. 57
court can not appoint receiver in another state, sec. 15, p. 58
on ground that special property vests in him, sec. 15, p, 58
where constructive service may be made on persons not within, sec. 32, pp. 203, 204
not for recovery of personal judgment, sec. 32, p. 204
courts can not order service of process beyond, sec. 38, p. 271
effect of commencing action in wrong place, sec. 45, pp. 326–334
effect of statutes requiring party to apply for change to proper place, sec. 45, pp. 326, 327
how jurisdiction may be attacked, sec. 45, p. 327
difference between local and transitory actions as to effect, sec. 45, pp. 327, 328
in garnishment, sec. 75, p. 551
in proceedings for writ of *habeas corpus*, sec. 82, p. 658

Trusts—
courts of equity have jurisdiction of, sec. 9, p. 24
when constructive service allowed in actions to enforce, sec. 38, p. 270

U

Umpire—
how may be appointed in arbitration proceedings, sec. 76, p. 576
powers of, sec. 77, p. 579

United States—
limitation as to jurisdictional amount does not affect in circuit court, sec. 16, p. 64

United States Courts. (See FEDERAL COURTS.)

V

Vacation. (See TERMS OF COURT.)
defined, sec. 19, p. 82
where term adjourned to subsequent day intervening time is, sec. 19, p. 82
in some states valid judgment may be rendered in and entered as of preceding or ensuing term, sec. 19, pp. 84, 85
weight of authority *contra*, sec. 19, p. 84
proceedings taken in, can not be rendered valid by consent of parties, sec. 19, p. 85
judgment rendered in term may be entered in, sec. 19, p. 86
authority of judges in, sec. 59, pp. 376–379

Vacation of Judgments. (See JUDGMENTS; NEW TRIALS AND VACATION OF JUDGMENTS.)

Vendor's Liens—
enforcement of within jurisdiction of courts of equity, sec. 9, p. 24

Venue. (See CHANGE OF VENUE; TERRITORIAL JURISDICTION.)
federal courts; diversity of citizenship, action where brought, sec. 15, p. 56
above rule when United States is plaintiff, sec. 15, p. 56
objection action brought in wrong county waived by general appearance sec. 22, p. 115
place of trial, how and when changed, sec. 22, p. 115
application not made in time, question of jurisdiction waived, sec. 22, p. 116

Venue—*Continued.*
effect of commencing action in wrong place, sec. 45, p. 326
when application for change necessary, sec. 46, pp. 329–332
objection to bringing in wrong place, how waived, sec. 46, p. 332
Verdict—
effect of, in determining jurisdiction as to amount, sec. 16, p. 60
interest on, how affects appellate jurisdiction, sec. 16, p. 65
may be received on Sunday, sec. 19, p. 82

W

Waiver. (See APPEARANCE.)
of service of process by appearance, sec. 13, p. 37; sec. 22, pp. 103, 115
appearance does not waive objection to illegal service, sec. 22, p. 104
nor does appearance after default and a motion to set the same aside, nor an appearance to contest the amount of damages after default, sec. 22, p. 105
when objection to jurisdiction waived by demurrer or answer, sec. 22 pp. 108, 110
by failure to plead in abatement, sec. 22, p. 109
by failure to demur, sec. 22, p. 110
appeal, when waives objection to jurisdiction, sec. 22, pp. 110, 111
action brought in wrong county, how objection waived, sec. 22, p. 115
want of jurisdiction of subject-matter can not be waived, sec. 22, p. 118
of objection to jurisdiction by pleading to the merits, sec. 34, p. 227
subsequent withdrawal of pleading does not affect, sec. 34, p. 227
objection that party not within territorial jurisdiction waived by pleading, sec. 34, p. 227
otherwise as to subject-matter, sec. 34, p. 228
so objection that cause has not been properly transferred to court waived by appearance, sec. 34, p. 228
special appearance not a waiver, sec. 34, p. 228
but plea to jurisdiction and to the merits at same time full appearance and waiver, sec. 34, pp. 228, 229
what amounts to waiver by appearance, sec. 34, pp. 227–233
withdrawal of appearance does not affect same as waiver, sec. 34, p. 233
but cases to the contrary, sec. 34, p. 233
effect of appearance in main action over auxiliary proceedings, sec. 34, pp. 233, 234
of process, what will amount to, sec. 41, pp. 300–305
of bringing action in wrong place, sec. 46, pp. 326–334
as to venue, sec. 49, pp. 344–347. (See CHANGE OF VENUE.)
disqualification of judge, when and how may be waived, sec. 62, pp. 401–404, 406, 408
of defects in attachment proceedings, sec. 74, pp. 542–544
of notice in garnishment, sec. 75, p. 550
Wills. (See COURTS; JURISDICTION; PROBATE JURISDICTION.)
jurisdiction and contest of, formerly exercised by courts of equity, sec. 9, p. 24
construction of, and enforcement of trusts under, part of equity jurisdiction, sec. 9, p. 24
jurisdiction of courts of equity to construe, sec. 67, p. 446

Wills—*Continued.*
what must be alleged in complaint to give jurisdiction of contest, sec. 67, pp. 455, 456
probate of, how far conclusive, sec. 67, p. 457
probate of, in one state, effect in another, sec. 67, p. 457
power to revoke, sec. 67, p. 455
jurisdiction over, generally, sec. 67, pp. 431–460

Witnesses—
examination of *de bene esse* a part of assistant jurisdiction of courts of equity, sec. 9, p. 25
also perpetuation of testimony of, sec. 9, p. 25
while in attendance at court, privileged from service of process, sec. 37, pp. 258–260

Writs. (See ATTACHMENT; CERTIORARI; INJUNCTION; MANDAMUS; NE EXEAT; SUMMONS; WRITS OF ERROR.)

Writs of Error.
existed at common law, sec. 21, p. 98
have been modified in some states and abolished in others by statute, sec. 21, p. 98
effect of on jurisdiction of court, sec. 24, p. 150
effect of on judgment, sec. 24, p. 150
are of two kinds, sec. 85, p. 692
coram nobis nature and objects of, sec. 85, p. 692
and of *coram vobis*, sec. 85, pp. 692, 693
former almost out of use, sec. 85, p. 693
writ of error as now used defined, sec. 85, p. 693
is a common law remedy for correction of errors, sec. 85, p. 694
regulated, at present day, by statute, sec. 85, p. 694
not applicable to special statutory proceedings, sec. 85, p. 694
record on can not be contradicted, sec. 85, p. 694
record, what must contain, sec. 85, p. 694
as existed at common law could not review order after judgment, sec. 85, p. 694
in what cases proper remedy in federal courts, sec. 85, p. 694
proper in criminal case, sec. 85, p. 694
confined to common law actions, sec. 85, p. 695
but subject to statutory control, sec. 85, p. 695
can not be used to control discretion of lower court, sec. 85, p. 695
will issue only after final judgment, sec. 85, p. 695
generally treated as writ of right, sec. 85, p. 695
coram nobis not writ of right, sec. 85, p. 695
litigants have no vested right to and may be taken away by statute, sec. 85, p. 695
only allowed to party or privy, sec. 85, p. 696
sometimes confined to parties of record, sec. 85, p. 696
so far original proceeding as to require notice and making of issues, sec. 85, p. 696
is put in motion by petition, sec. 85, p. 696
and summons or citation issues, sec. 85, p. 696
pleading is assignment of errors, sec. 85, p. 696
only errors assigned can be considered, sec. 85, p. 696
decision of court below necessary foundation of jurisdiction, sec. 85, p. 696
must appear by record to have been presented and decided, sec. 85, pp. 696, 697
errors of fact can not be corrected by, sec. 85, p. 697
writ has been abolished in some states, sec. 85, p. 697

Writs of Error—*Continued.*
legislature may regulate, sec. 85, p. 697
appeal supersedes, when, sec. 85, p. 697
suspends proceedings in court below, sec. 85, p. 698
but does not vacate judgment, sec. 85, p. 698
jurisdiction of can not be conferred by statute, sec. 85, p. 698
Writs of Review. (See Bills and Writs of Review.)

UC SOUTHERN REGIONAL LIBRARY FACILITY
AA 000 847 843 0

UNIVERSITY OF CALIFORNIA LIBRARY
Los Angeles

This book is DUE on the last date stamped below.

JAN 4 1932
LAW Library Recd
DEC 28 1931

Form L9–Series 4939